Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

NEW PORT LARGO, INC.,

Petitioner,

v.

MONROE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether there is a right to trial by jury on claims for inverse condemnation damages under 42 U.S.C. § 1983, by virtue either of the Seventh Amendment to the United States Constitution or section 1983 itself.

II

Whether the actions of a local government in limiting the use of private property to one public purpose deemed "necessary" by the government represent a "temporary taking" of private property requiring compensation under the Fifth Amendment and this Court's prior decisions.

III

Whether the Court of Appeals improperly failed to give full faith and credit under 28 U.S.C. § 1738 to a prior state court judgment invalidating the airport zoning of Petitioner's property as confiscatory under state law.

LIST OF PARTIES TO THE PROCEEDING

Appellant, New Port Largo, Inc., a Florida corporation.

Appellee, Monroe County, Florida, a subdivision of the State of Florida.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, New Port Largo, Inc., a Florida corporation, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on September 25, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), and is set forth at App. A. The district court's opinion, which is reported as *New Port Largo, Inc. v. Monroe County*, 873 F. Supp. 633 (S.D. Fla. 1994), is set forth at App. B. An earlier opinion of the Court of Appeals in the same litigation (reversing a dismissal by the district court based on statute of limitations) is reported at *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir.), *cert. denied*, 510 U.S. 964 (1993).

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Court of Appeals in this case was rendered on September 25, 1996. The Court of Appeals thereafter denied a petition for rehearing and suggestion for rehearing en banc on January 31, 1997.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This is a constitutional regulatory takings case, brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, enforcing rights under the Fifth Amendment as made applicable to the states and their political subdivisions by the Due Process Clause of the Fourteenth Amendment, which raises issues relating to the right to jury trial and the circumstances in which property has been "taken".

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> . . . nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress. For

> the purposes of this section, any Act of Congress shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1738 provides, in pertinent part, as follows:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copy thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto. The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Federal Rule of Civil Procedure 38 provides as follows:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

This case arises from a lengthy factual background.[1] The most salient facts, however, can be briefly stated. Petitioner, New Port Largo, Inc. ("NPL"), the plaintiff in the district court and appellant in the Court of Appeals, purchased, among other property, approximately ten acres of land fronting the Atlantic Ocean in Key Largo, Monroe County, Florida, approximately fifty miles south of Miami. For a period of seven years prior to the purchase, the land had been zoned for residential use ("RU-2") and divided and platted into twenty-six homesite lots. The previous owner had not yet built houses on the lots and, at the time of purchase, a third party operated a private airstrip on the property, pursuant to a lease.

Thirty-eight days after NPL's September 30, 1979 closing on the purchase, Monroe County itself, in an unprecedented move, filed an application to rezone the residential lots as airport ("PA") for the express purpose of ensuring that the existing airstrip remained open for the public's use and to prevent the property's residential development by NPL. The County's Zoning Board approved the County's own proposed rezoning to airport on January 24, 1980, and the Board of County

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[1] Many of the background facts were litigated in a prior state court action brought by Monroe County claiming title ownership of the rezoned property on a theory of constructive trust. The court's final judgment in New Port Largo's favor, containing extensive findings of fact and conclusions of law relating to the property in question, is attached as Appendix I. The judgment was affirmed in *Monroe County v. New Port Largo*, 467 So.2d 757 (Fla. App. 1985).

Commissioners ratified the rezoning on September 11, 1980. NPL, the aggrieved landowner, filed a petition in state court, seeking to vacate the zoning as violating the essential requirements of law.[2] NPL relied upon procedural objections to the rezoning process and also contended that the rezoning was a prohibited "taking" of private property for public use in violation of the federal and state Constitutions, and thus void as "confiscatory" under state law. *See generally Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213, 215-16 (Fla. 1984); *Kasser v. Dade County*, 344 So. 2d 928, 929 (Fla. App. 1977) (illustrating Florida law that confiscatory zoning will be voided on certiorari attack).

Ultimately, on January 2, 1986, the state court overturned the rezoning as confiscatory and as procedurally defective (App. H). The Florida state court ruled, in a Judgment, which the County did not appeal, that the property "did not qualify by dimensions" to be an airport under state law:

> During the year 1982 Monroe County filed suit to establish ownership of the subject property, Case No. 82-432-CA-17, Monroe County Circuit Court. In 1984, the Circuit Court denied the claim of the County, declaring the property to be owned by plaintiff. This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use. App. H at H-2.

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[2] While the Eleventh Circuit opinion (by scrivener's error) recites that this challenge was filed in 1986, it is undisputed that NPL filed the lawsuit in 1980. It was the Final Judgment in NPL's favor (invalidating the airport zoning) which came in 1986. App. H.

THE COURSE OF PROCEEDINGS

In 1987, following victory in the Florida courts, in light of the fact that Florida law provided no damages remedy for confiscatory zoning, *National Bulk Carriers, supra; Kasser, supra; Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1517-1519 (11th Cir. 1987); *New Port Largo, Inc. v. Monroe County,* 985 F.2d 1488, 1493-94 (11th Cir.), *cert. denied,* 510 U.S. 964 (1993) (*NPL I*), NPL filed this action and its claim for damages for a temporary taking in the federal district court under 42 U.S.C. § 1983. This case was within the district court's federal question jurisdiction under 28 U.S.C. § 1331.

After extended pretrial proceedings, including a dismissal and a reversal by the Eleventh Circuit, *NPL I, supra,* the district court denied both parties' motions for summary judgment as to liability on the takings claim, R16-328 and R16-349, finding disputed issues of fact for trial.

At the final Pretrial Conference, on September 26, 1994, mere weeks before trial, the district court granted Monroe County's *ore tenus* motion to strike NPL's jury demand based on a dictum in a then-recent case from the Eleventh Circuit Court of Appeals. R31-68. An Eleventh Circuit panel had stated in *Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536 (11th Cir.), later vacated, 42 F.3d 626 (11th Cir. 1994): "the court determines all issues, legal and factual, in an inverse condemnation suit, save the question of just compensation." *Id.,* 18 F.3d at 1550.

Acknowledging that the *Highland Beach* dictum had wrought a change in the law, Monroe County's counsel told the district court: "[T]he law has been really bollixed up by the Eleventh Circuit" and "it is very hard to parse out exactly who does what". R31-17-18[3]. Monroe County then asked the district court to act as fact finder on all issues in the case relating to liability. The district court concurred, as stated in a written Order on Pretrial Conference: "The remaining issues of liability concerning Plaintiff's allegations that Defendant wrongfully deprived it of its property without just compensation in violation of the Fifth Amendment to the United States Constitution and 42 U.S.C. § 1983 shall be tried to the court alone as trier of fact." Following this ruling, NPL filed an emergency Writ of Mandamus to the Eleventh Circuit, which was denied without opinion on October 7, 1994. Case number 94-5031.

Following an eight-day bench trial, the district court issued a Memorandum Opinion in favor of Monroe County on December 20, 1994, reported at *New Port Largo, Inc. v. Monroe County,* 873 F.Supp. 633 (S.D. Fla. 1994) (App. B), and entered a Final Judgment on January 3, 1995. R22-491.

Upon NPL's appeal, the Eleventh Circuit Court of Appeals affirmed. *New Port Largo, Inc. v. Monroe County,* 95 F.3d 1084 (11th Cir. 1996) (App. A). The Court of

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[3] Petitioner will use record citations as in briefing in the Court of Appeals. R. refers to items in the court record; PX refers to plaintiff's exhibits at trial by exhibit number, followed, where applicable, by page number.

Appeals, analogizing New Port Largo's claim to a condemnation action brought by the federal government, found there was no right to trial by jury on any of the liability issues raised by NPL's taking claim. The Court of Appeals then, applying the "clearly erroneous" standard of review applicable to fact-findings in bench trials, affirmed the district court's ruling that the rezoning of homesites to a public-use airport for the public's benefit was not a taking.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS DENYING THE EXISTENCE OF A RIGHT TO TRIAL BY JURY IN TAKINGS DAMAGES CASES IS EXCEPTIONALLY IMPORTANT AND CONFLICTS WITH THE LAW IN OTHER CIRCUITS AND WITH APPLICABLE DECISIONS OF THIS COURT

A. The Issue of Right to Jury Trial is Exceptionally Important

NPL's complaint demanded a jury trial on its claims. (R1-1-paragraph 120). The Court of Appeals held, however, that despite a plaintiff's demand, there is no right to trial by jury on inverse condemnation claims under 42 U.S.C. § 1983. "We have discovered," stated the Court of Appeals, "no indication that the rule in regulatory takings cases differs from the general eminent domain framework," in which, as in *United States v. Reynolds*, 397 U.S. 14 (1970), and under Fed.R.Civ.P. 71A, the district

court acts as the trier of fact on all issues other than the amount of just compensation.

Thus, the decision of the Court of Appeals would simply eliminate the right to jury trial for all other factual issues other than the amount of damages in inverse condemnation cases under 42 U.S.C. § 1983. Plainly, this is an exceptionally important decision, as factual issues of the value of property, the credibility of witnesses, and innumerable other issues of knowledge, intent, and other historical facts are likely (as in this case under the view of the Court of Appeals) to be dispositive of the merits of inverse condemnation claims. It is an exceptionally important question whether there is a right to trial by jury in this very important area, where this nation's balance between the rights of private property and the power of the government is determined.

This Court in *Beacon Theaters Inc. v. Westover*, 359 U.S. 500, 501 (1959) and again in *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 565 (1990) repeated: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." (quoting, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The Court recently, in *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995), re-emphasized the central importance of the jury's role in criminal fact-findings by overruling the majority of the Courts of Appeal which had eliminated the "materiality" element of false statement statutes from the jury's consideration. It is at least as important to prevent the wholesale erosion of the

jury's historical role by the Court of Appeals decision for which review is sought.

B. The Decision of the Court of Appeals Has Created a Conflict Among the Circuits.

The decision of the Court of Appeals for the Eleventh Circuit is in irreconcilable conflict with the only other Court of Appeal which has squarely addressed the issue of right to jury in inverse condemnation cases. In *Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996)[4], the Court of Appeals for the Ninth Circuit expressly held that the plaintiff "was entitled to have a jury try its inverse condemnation claim" brought under 42 U.S.C. § 1983, *id.* at 1427, thus rejecting the defendant's argument that the district court should have been the trier of fact on all "takings" issues. Recognizing that the 1871 Congress which enacted section 1983 expressly gave plaintiffs the right to either an "action at law" or a "suit in equity", the Ninth Circuit found that Congress' intent was to create a right to trial by jury in an "action at law" under the statute. Thus, since that case (like this one) was a claim for damages under section 1983, either party had the right to demand a jury trial on liability as well as damage issues. *Id.* Basing its decision on Congressional intent, the Ninth Circuit did not reach the issue of the constitutional right to trial by jury under the Seventh Amendment. *Id.* at 1426. In reaching its decision, however, the Ninth Circuit cited, and followed the

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[4] The Ninth Circuit decision was issued only weeks apart from the Eleventh Circuit decision herein.

spirit of, some of this Court's leading Seventh Amendment cases, discussed below. Thus, the Eleventh Circuit and the Ninth Circuit Courts of Appeals, two of the nation's largest, have reached opposite results on the issue of the right to jury trial in inverse condemnation actions; an issue of fundamental importance and one that is likely to recur.

The other circuits, while not having occasion to address inverse condemnation claims, have had no problem concluding that there is a right to jury trial for section 1983 damage claims. *E.g., Perez-Serrano v. DeLeon-Velez*, 868 F.2d 30 (1st Cir. 1989) (reversing ruling in which section 1983 liability issues were resolved by the Court); *Segarra v. McDade*, 706 F.2d 1301, 1304 and n.6 (4th Cir. 1983) (constitutional right to jury trial exists for § 1983 damages claims); *Farber v. Massillon Board of Education*, 917 F.2d 1391, 1399-1401 (6th Cir. 1990) (Seventh Amendment right to jury trial applies to section 1983 claims), *cert. denied*, 498 U.S. 1082 (1991). Thus, the decision of the Court of Appeals for the Eleventh Circuit herein is the sole exception in a previously-unanimous federal jurisprudence.

C. The Decision of the Court of Appeals Conflicts with Decisions of This Court.

The decision of the Court of Appeals on the jury trial issue is equally incompatible with the pertinent decisions from this Court, and would represent a sharp curtailment of that historically precious right. This Court's decisions have established an expansive framework for application of the right to jury trial. A key case, not addressed by the

Court of Appeals, was this Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), where this Court held, interpreting another civil rights statute, Title VIII, 42 U.S.C. § 3612, that although there was no pertinent legislative history regarding Congressional intent toward jury trial, "we think it is clear that the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under s. 812." 415 U.S. at 192. Treating the issue as one which was too obvious to have arisen previously, this Court announced that statutory damages actions fell within the right to trial by jury: "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Id.* at 194. With the apparent intention of avoiding error such as that committed by the Court of Appeals in this case, the Court instructed:

> [W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

Id. at 195. In that case, a claim for compensatory damages was held to be "analogous to a number of tort actions recognized at common law," *id.* at 195, and "the relief sought here – actual and punitive damages" to be "the traditional form of relief offered in courts of law." *Id.* at

196.[5] Other cases of this Court are to similar effect. *Markman v. Westview Instruments, Inc.*, ___ U.S. ___, 116 S.Ct. 1384, 1389 (1996) (right to jury exists in statutory patent infringement actions); *Woodell v. IBEW Local 71*, 502 U.S. 93, 97 (1991) (claim of worker against union under LMRDA carried right to jury trial; "an award of money damages was the traditional form of relief offered in the courts of law"); *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558 (1990) (claim of worker against union for violation of duty of fair representation required trial by jury since claim was legal rather than equitable); *Tull v. United States*, 481 U.S. 412 (1987) (right to trial by jury exists on whether a civil penalty may be imposed under the Clear Water Act); *Pernell v. Southall Realty*, 416 U.S. 363 (1974) (right to jury trial found for statutory action to evict tenant). Of course, this case is equally a claim for compensatory damages, the classic form of relief in an action at law.

The Court of Appeals based its decision against the right to jury trial on an unwarranted extension of the rule in eminent domain proceedings brought by the United States. To be sure, when the United States exercises this sovereign prerogative, there is no right to jury trial. *United States v. Reynolds*, 397 U.S. 14, 18-19 (1970); *Bauman*

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[5] While the Court did not expressly address the applicability of the principles announced in that case to 42 U.S.C. § 1983, the numerous section 1983 cases which have been reviewed by this Court following jury trial, without any issue being raised in that regard, e.g., *Helling v. McKinney*, 509 U.S. 25 (1993), and the unanimity of the courts of appeal, as cited above, confirm that section 1983 is governed by the principles announced in *Curtis*.

v. Ross, 167 U.S. 548, 593 (1897); *Kohl v. United States*, 91 U.S. 367, 376 (1875). The situation, however, when a plaintiff seeks money damages under 42 U.S.C. § 1983 from a local government is very different than a condemnation suit by the United States. First, section 1983 contains no restriction on the jury's role, as does Fed.R.Civ.P. 71A. See *Del Monte Dunes, supra* (holding the Congressional intent at the time of section 1983 was to provide trial by jury on legal claims). Second, ignoring Congress' intent and addressing the Seventh Amendment, the eminent domain situation comes within the "public rights" exception to the Seventh Amendment, in which "the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact," as described in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 449 (1977) (expressly citing condemnation actions, 430 U.S. at 457). This Court has expressly limited the public rights exception to the Seventh Amendment right to jury trial to federal regulatory programs and actions involving the Federal Government:

> If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial.

Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 54-55 (1989)[6] (holding that right to jury trial existed in certain

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[6] Interestingly enough, the *Financiera* decision also reversed a decision by the Eleventh Circuit, which had affirmed

fraudulent conveyance actions brought under the Bankruptcy Code).

Plainly, in this case, a legal claim for damages filed in an Article III court is at issue; the federal government is not a party; and no federal regulatory scheme is involved. Under this Court's cases, such disputes must be resolved upon demand by a jury. The Eleventh Circuit's broad elimination of the constitutional right to jury trial on all factual issues in takings cases is exceptionally important, and in conflict with the decisions of other circuits, and of this Court. The decision of the Court of Appeals certainly warrants this Court's review.

II

THE DECISION OF THE COURT OF APPEALS REGARDING TAKINGS PRINCIPLES IS EXCEPTIONALLY IMPORTANT AND IN CONFLICT WITH THE DECISIONS OF THIS AND OTHER COURTS.

This Court in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), recognized the government's duty to compensate landowners damaged by a "temporary" taking: "Invalidation of the ordinance . . . though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.* at 319. After *First English,* this Court has not had further occasion to address the circumstances in which a temporary deprivation of the right to use and control property requires "just

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a decision denying a party's right to jury trial by the same district judge involved in this case.

compensation" under the Fifth Amendment. The facts of this case certainly present the constitutional issues involved with crystalline clarity.

This case further presents an attempt to undermine drastically the temporary takings anlysis of *First English*. The Court of Appeals held that private land can be commandeered for public use so long as the unwilling property owner is entitled to charge admission.[7] The implications of that rationale are profound, far-reaching, and potentially devastating for property owners. Moreover, the Court of Appeals' rationale would permit local governments to rezone residential or other property to various public uses ranging from airports to parks to waste dumps. Rather than recover just compensation for the loss of private property, the landowner would be consigned to whatever price of admission he might obtain, (no matter how nominal) for whatever use (no matter how undesirable) the government has selected. Surely, that is a deplorable scenario. Just as plainly, it is an unconstitutional result that cannot be reconciled to this Court's commands in *First English*.

This is a case in which Monroe County, from its own initial application for rezoning in 1979 until its final loss in the state courts in 1986, acted with one purpose in

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[7] While such was the holding herein, the reality for NPL was that the "admission" fee was no more than a stipend; the district court acknowledged that the rental value of the property was nominal. App. B at B-38-39. The lease agreement provided for a maximum rent of $150 per month (PX 4-1A) on a property, which according to undisputed evidence presented at trial, would have sold for at least 2.8 million dollars zoned residential. R. 37-1017; R. 35-717.

mind: to ensure that New Port Largo's land would be used for an airport for the public's benefit. The Chairman of the County's Zoning Board, Ken Sorenson, who was later a Commissioner, stated at the hearing where the rezoning was initially approved, "I feel this airport is vital to the economic interest of the community." (PX 1-14-141) Sorenson later testified, as Commissioner, at a hearing on the County's motion to enjoin New Port Largo from closing the airport on its property, that the airport was generating about $1 million per year to the County in tax revenue and that "the loss of that airport could be disastrous." (PX 7-27, p. 172-73) Another County Commissioner, Curtis Blair, stated at a 1981 County Commission meeting that while New Port Largo's property was really too narrow to be an airstrip, and the County should "pursue some other adequate place"; in the meantime, "as long as we are staying here, it will stay an airport" (PX 7-37-9). Still a third County Commissioner, Alison Fahrer, testified by deposition that the County had acted to "delay the return of the airstrip from the control of the County" by testifying in an eviction hearing brought by New Port Largo against the airport tenant that the airstrip was "the property of the County." (PX 4-2-94) Commissioner Fahrer bragged about her successful testimony in her local newspaper column: "The judge supported our concern, and ruled in favor of the present operator's propriety, under a lease from the County, to continue operation." (R. 35-709; PX 4-27) The airport lessee, Gary Lalonde, had similarly testified during eviction proceedings that the County had entered into a lease with him (unbeknownst to NPL) and accepted rent from him while

New Port Largo was trying to evict him from the premises; PX 4-2-47 to 52.[8] The Monroe County Attorney at the time of these events, Lucien Proby, testified at trial that the effect of the airport zoning was that the landowner "was compelled to use the airstrip as a runway where airplanes land and take off." In response to a question by the district court as to whether the owner could "close it down", Proby answered that in his opinion, "they could not have done that." (R34-568 to 571). Suffice it to say that the record presented ample evidence of Monroe County's intent to commandeer New Port Largo's property and dedicate it to public use against the will of its owner.

Under the standard applied by the Court of Appeals, it was irrelevant that the County put private property to public use: "regardless of Plaintiff's chances of ever turning a profit, Plaintiff remained free to transact some business, for profit, with the public at large." The regulation, according to the Court of Appeal, "told NPL how it could use the property for profit, but did nothing to require NPL to open its property to the public for use just as the public wished." 95 F.3d at 1087. The Court of Appeals felt that there was no problem of compelled public access: "the airport zoning allowed NPL, if it chose, to let the

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[8] While the Court of Appeals treated this evidence of so-called "conspiracy" or cooperation between the airport tenant and the County as a separate, and unripe, takings cause of action, in fact this was evidence of a unitary course of conduct by the County, relevant to show the "character of the government action", a key factor in the decision of whether there was a taking under this Court's cases. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Babbitt v. Youpee*, ___ U.S. ___, 117 S.Ct. 727, 732 (1997).

property sit completely empty," *id.* at 1088, and "the property could have remained dormant." *Id.* at 1087. Thus, the Court of Appeals, based on the district court's "factual" finding that New Port Largo had not been denied all economically viable use, found that New Port Largo's property had not been taken.

The decision of the Court of Appeals conflicts with the reasoning of numerous other decisions of this Court, and other courts. Neither the Court of Appeals nor the district court addressed the "character of the government action," *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), which this Court held dispositive just this Term in *Babbitt v. Youpee*, ___ U.S. ___, 117 S.Ct. 727, 732 (1997). The character of the government actions here was to create a public benefit by dedicating private property to public use. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987), *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960). This principle has been given specific application in numerous decisions of this Court. *E.g., Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 2316 (1994) ("without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred"); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) ("had California simply required the Nollans to make an

easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach . . . we have no doubt there would have been a taking"); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requirement of public access eliminated the owner's right to exclude and therefore was a taking); *United States v. Causby*, 328 U.S. 256 (1946) (low flight of aircraft over plaintiff's property as much a physical invasion as if the property itself were used for a runway); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requirement that a landlord allow installation of cable on his property is a taking); *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983) (zoning to "public use" held a taking).

The Court of Appeals has read this Court's analysis in *Dolan* and *Nollan* narrowly. According to the Court of Appeals, the constitutional defects identified by this Court in those cases rested not on the fact of dedication of private property to public use, but solely on the fact that in those cases the landowners were not allowed to charge the public for access to their property. Under the standard applied by the Court of Appeals, any private property can be converted to public use, with *only* such public use allowed, so long as the landowner is free to charge admission, or to leave the property "dormant" or "empty."

It is a crucial question whether governments may with impunity assign government functions such as operation of airports, sanitary disposal, or perhaps education or incarceration to unwilling private property owners, so long as the owner is given the right to charge the public. (As is typically the case with airports, governments rarely

recoup their costs in such ventures, notwithstanding that expert testimony may be available, as in this case from the County's airport expert, that making a profit on the activities is theoretically possible.) The jaundiced view of the Takings Clause chosen by the Court of Appeals is potentially devastating to private property rights and irreconcilable with the previous decisions of this and other courts. If the Court of Appeals' decision is allowed to stand, there will be no constitutional objection to the zoning of private land for any public use which a local government may deem desirable: airport, park, or waste dump. The natural extension of such reasoning – that there is no reason for a local government to acquire land by condemnation for a particular public use when it can simply require the landowner to perform the public function by zoning – should find no adherents on this Court. The decision of the Court of Appeals warrants this Court's review.

III

THE COURT OF APPEALS' FAILURE TO PROPERLY GIVE FULL FAITH AND CREDIT TO A PRIOR STATE COURT JUDGMENT IS EXCEPTIONALLY IMPORTANT AND IN CONFLICT WITH THIS COURT'S DECISIONS

A second important aspect of the decision of the Court of Appeals on the taking issue which warrants this Court's review, is the court's cavalier disregard of the prior judgments of the state courts. Under this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a federal court claim for inverse condemnation is not ripe unless a state

remedy is absent. In a case, however, as in this one, where there was no pertinent state remedy, *New Port Largo I, supra,* 985 F.2d at 1493-94, the district courts are the appropriate forum for the Fifth Amendment claim mandated by *First English* to compensate for a "temporary taking". The plain mandate of *First English* is that a landowner becomes entitled to compensation when zoning is overturned as confiscatory.

In this case, however, the decision of the Court of Appeals is essentially to the contrary: Although a state court Judgment found that the airport zoning was void as confiscatory under state law, the Court of Appeals found no entitlement to just compensation. The district court expressly denied New Port Largo's motion to give full faith and credit to the state court Judgment, stating brazenly that "there is so much new law what is a taking, what is not a taking" that "I think it would not be appropriate to give conclusive effect to the opinions of the state court, as much as I would like to give, and generally do give, full faith and credit to their opinions." (1SR-60 to 61) This decision was crucial because the district court's "findings" then proceeded to simply contradict the state court Judgment point by point. The state court had found that "the only permitted use in said zoning district is a private airport" (App. H at H-2); the federal district and appellate courts disagreed, finding that the zoning district permitted marinas, beach clubs, and tennis courts. The state court had found that "the subject property does not qualify by dimensions to meet the requirements as a public airport or a private airport" (App. H at 2); the federal courts disagreed, finding that the property could be profitably operated as an airport.

The state court had found that "rezoning of the property to airport would deprive the owner of any reasonable use" (App. H at 2); the federal courts once again disagreed, finding there were reasonable uses after the rezoning.

The principles of federalism do not tolerate such free-wheeling disavowal of state judicial rulings. In *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), this Court determined that actions under section 1983 are governed by the same standards of full faith and credit as other actions. Section 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources." *Migra*, 465 U.S. at 84.

This Court, in *Matsushita Electric Industrial Co. v. Epstein*, ___ U.S. ___, 116 S.Ct. 873 (1996), reversed a decision of a Court of Appeals for "fail[ing] to follow the dictates of the [Full Faith and Credit] Act." *Id.* at 877. That same transgression is manifested here. While the district court *expressly* refused to follow the Act, the Court of Appeals endeavored to side-step the issue in an argument which can most charitably be called Orwellian. Remarkably, the Court of Appeals held that the lynchpin of the state court's analysis – finding that the rezoning left the property owner with no reasonable use of his land – was not "necessary or material" to the state court's ruling. 95 F.3d at 1089-90. That rationale is untenable on its face. Plainly, when the Court of Appeals affirms a finding of "no

taking" on the premise that the property could be used "as a private airport, and also for the construction of boat slips, a beach club, or dry storage space for boats," 95 F.3d at 1089, in the face of a contrary state court finding (unaddressed by the Court of Appeals) that "the only permitted use . . . is a private airport," there has been a complete denial of full faith and credit. Decisions such as that of the Court of Appeal destroy the principles of the federalist system of adjudication enacted by Congress as one of its first acts. *See Kremer v. Chemical Construction Co.*, 456 U.S. 461, 462-63 (1982). While the application of full faith and credit is inherently fact-specific, the principle of Full Faith and Credit is exceptionally important, as this Court has repeatedly emphasized. The failure of the Court of Appeals to follow the dictates of the Full Faith and Credit Act also warrants this Court's review.

CONCLUSION

Petitioner, New Port Largo, Inc., respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Dated: May 1, 1997
Miami, Florida

APPENDIX

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APPENDIX A

New Port Largo, Inc. v. Monroe County
95 F.3d 1084 (11th Cir. 1996)

NEW PORT LARGO, INC., a Florida Corporation, Plaintiff-Appellant,

Charles H. Netter, et al., Plaintiffs,

v.

MONROE COUNTY, a political subdivision of the State of Florida, et al., Defendants-Appellees.

No. 95-4142.

United States Court of Appeals,
Eleventh Circuit.

Sept. 25, 1996.

Landowner sued county, alleging that county's rezoning of landowner's beachfront property from residential duplex use to private airport use constituted temporary regulatory taking and deprivation of due process. The United States District Court for the Southern District of Florida, No. 87-10043-CIV-JLK, James Lawrence King, J., 873 F.Supp. 633, granted judgment for county. Landowner appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) county's action was not deprivation of "right to exclude"; (2) physical occupation claim was not ripe for review; (3) county was not estopped from arguing that its action did not result in deprivation of all economically viable uses; (4) county was not equitably estopped from rezoning property; (5) property was not so patently unsafe for use as airport that rezoning constituted violation of landowner's substantive due process rights; and (6) empaneling of jury was not required.

Affirmed.

Michael R. Seward, Law Office of Michael R. Seward, Key Largo, FL, Jeffrey B. Crockett, Aragon Martin, Burlington & Crockett, P.A., Miami, FL, for Appellants.

Alan G. Greer, James W. Middleton, Floyd, Pearson, Richman, Greer, Weil, Brumbaugh & Russomanno, P.A., Miami, FL, James T. Hendrick, Morgan & Hendrick, Key West, FL, for Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

EDMONDSON, Circuit Judge:

New Port Largo, Inc. (NPL) appeals the district judge's rejection, after a bench trial, of the claims that Monroe County violated NPL's rights under the takings clause and the "substantive" component of the Fourteenth Amendment's due process clause. This case was before us on appeal previously.[1] Today, we affirm the district court's rejection of NPL's substantive claims.

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] In *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir.1993) ("*NPL I*"), we determined that NPL's regulatory takings claims were not barred by the applicable statute of limitations.

I. Background

The facts of this case have been set out in earlier proceedings and will not be repeated here at length.[2] Instead, we present the following background relevant to our disposition of this case.

NPL contends that the rezoning of its beachfront property, a "breakwater" in Monroe County (the "property"), requires compensation from the County. NPL purchased the property from a private trust in 1979, before the contested PA rezoning. The private trust had acquired the property after the land was dredged from beneath the water for the purpose of creating a landing strip that would also shelter some previously existing beachfront lots from harsh weather. The rezoning from RU-2 (residential duplex use) to PA (private airport use) in 1980, shortly after NPL's purchase.

After the property was rezoned to PA, NPL brought suit in Florida state court in 1986, alleging that the procedures by which the property was rezoned were invalid according to the County's Major Development Project Ordinance. NPL also contended that the rezoning was a taking and violated due process. NPL prevailed in the effort to invalidate the zoning (as NPL had prevailed in 1984 in a suit by the County contesting the ownership of the property). Here, NPL asserts that, while the title suit was pending, the property was illegally occupied by one LaLonde, the operator of a private airport. NPL contends

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[2] For a fuller explanation of the facts, see *NPL I* and the opinion of the district court on remand, set out at 873 F.Supp. 633 (S.D.Fla.1994).

that LaLonde held over beyond the end of his lease on the advice of the County, during which time he paid to the County, and the County accepted, continued payments for the use of the property. NPL now seeks to recover the value of the land during the time the regulation limiting its use was in effect.

NPL sued a number of defendants on a number of theories. Now, the only remaining defendant is Monroe County, against whom NPL asserts claims for a temporary taking of property in violation of the Fifth Amendment and a deprivation of due process in violation of 42 U.S.C. § 1983. After a bench trial, the district court granted judgment in full to the County.

II. The Takings Issues

Plaintiff argues several substantive theories in support of its claim that its property has been taken without compensation in violation of the Fifth Amendment. NPL contends that Monroe County (1) effectively deprived NPL of the right to exclude others; (2) physically occupied NPL's property; (3) deprived NPL of all economically viable uses of its property; and (4) induced NPL to rely in good faith on the existing zoning. We reject each of these contentions in turn.[3]

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[3] We first note that this case, as we determined in the previous appeal, is ripe. *See NPL I*, 985 F.2d at 1494 ("At that time [January 2, 1986], both events required by *Williamson* to establish accrual of the takings claim had occurred.") (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (subject matter jurisdiction over takings cases requires satisfaction of "final decision" test and "just compensation" test)).

A. Deprivation of the Right to Exclude

NPL argues that the County's action constitutes a deprivation of the right to exclude. *See generally Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 393, 62 L.Ed.2d 332 (1979) ("[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation. . . . "). NPL's argument here is that by rezoning to airport use, thus precluding all use of the property but as a private airport, the County effectively "circumvent[ed] eminent domain through its zoning power." The County, according to NPL, zoned private property so it could only be used for the public good; in essence, the property would function as publicly owned property.

The County's act of rezoning the property to private airport was not, in itself, a deprivation of the right to exclude. NPL nowhere contends that, as a matter of law, the rezoning to private airport required it to admit the public. Because the property could have remained dormant, consistent with the PA zoning, NPL cannot argue that the rezoning was a deprivation of the right to exclude in the traditional sense.

Thus, NPL presses a more creative argument. In support of its theory that it was basically forced to invite the public onto its land, NPL relies on *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D.1983), which found a taking where residential property was rezoned for "public use." The North Dakota court reasoned that the rezoning had "the purpose and practical effect of appropriating private

property for public uses without giving the landowners the constitutionally required compensation." *Id.* at 508-09.

The *Rippley* case is unpersuasive as authority for this particular plaintiff for a number of reasons, but suffice it to say that the *Rippley* rezoning allowed only public uses (such as school, park, sewage treatment plant, and so on). There, the property would have yielded no revenue unless the City of Lincoln decided to purchase it. *Id.* at 508. Otherwise, the *Rippley* plaintiffs could use their property only by allowing the public access free of charge: all residential and commercial uses were prohibited. *Id.* Here, regardless of Plaintiff's chances of ever turning a profit, see below Part II.B, Plaintiff remained free to transact some business, for profit, with the public at large. Thus, we reject the argument that the rezoning was a de facto condemnation. The reasoning of *Rippley*, even were we to conclude it is persuasive, does not require compensation here.

Plaintiff's analogies to *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), are also inapposite. In these cases, a state had demanded that a person open his or her property to public traffic, again without compensation. That fact distinguishes NPL's situation: the regulation in this case told NPL how it could use the property *for profit*, but did nothing to require NPL to open its property to the public for use just as the public wished.

B. The Physical Occupation

NPL alleges that the County "commandeered" the property by "conspiring" with LaLonde, the airport tenant, to ensure his continued occupation of the property beyond the expiration of his lease, and by accepting rents from LaLonde, thereby exercising dominion over property which was actually NPL's. We conclude that NPL is, at this time, due no compensation on this "physical occupation" theory.

By now it is beyond question that a permanent physical occupation of private property by the state constitutes a taking for which a landowner must be compensated. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992) (takings clause requires compensation for "regulations that compel the property owner to suffer a physical 'invasion' of his property"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982) ("[W]hen the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation. . . . ") (citations and internal quotation marks omitted). We point out, however, that NPL's property has not been physically occupied in the traditional sense. *Loretto* is an inapt analogy: the landowner there could not exclude the cables from his property, at any cost; here, the airport zoning allowed NPL, if it chose, to let the property sit completely empty. The County did not directly physically occupy anything. *Cf. id.* at 436, 102 S.Ct. at 3176 ("[S]uch [a physical] occupation is qualitatively more severe than a regulation of the *use* of property. . . . ").

And, we decline now to address NPL's variation on this theory: that the County effected a physical occupation by "conspiring" with LaLonde to ensure LaLonde's continued presence on NPL's land and receiving rents on that land.[4] Assuming that the takings clause would mandate compensation for rents unlawfully received by a governmental entity for land not belonging to it, NPL has failed to show that a claim of this nature is now ripe. Specifically, nothing has been called to our attention in the record to show that NPL, by state law procedures, tried and failed to get "just compensation" for this rent-taking activity – which we see as involving a different theory from that underlying the regulatory "taking" accomplished by the zoning ordinance. *See generally Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121 ("[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. . . . "). With no indication that Florida property law or tort law deny recourse to one whose property is unlawfully leased by someone, including a government subdivision, to a third party, we cannot consider whether

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[4] We note that the County operates – as an institution of government – through its legislative enactments, such as zoning. The act of "conspiring" with the private occupant of NPL's land is not the kind of uniquely governmental act that underlies a takings claim, ordinarily at least. Therefore, we question whether acts of "conspiracy" by individual members of a zoning board are governmental acts, for takings purposes; we also doubt that the Fifth Amendment requires compensation for these acts. But, because of the ripeness concern set out in the text, we pass over these issues.

the Fifth Amendment would allow some compensation for that act.

C. Deprivation of All Economically Viable Uses

In addition to physical invasions of property, the Supreme Court has also accorded "categorical treatment," invariably requiring compensation, to cases "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. at 2893. Here, the district court found that under the new zoning ordinance, NPL could still use its property in several economically viable ways: as a private airport, and also for the construction of boat slips, a beach club, or dry storage space for boats. This finding was essentially the result of the trial judge's decision to credit the testimony of Defendant's expert about the property's lawful and profitable uses.

We review the facts for clear error. *See Lucas*, 505 U.S. at 1020 & n. 9, 112 S.Ct. at 2896 & n. 9 (describing district court's determination that no economically viable use remained as conclusion of fact). Here, we conclude from our review of the record that the district judge's findings were not clearly erroneous. Therefore, no compensation is due on the ground that the rezoning left NPL with no economically viable uses of its property.

NPL contends, however, that a factual finding by the judge in the state court action to invalidate the rezoning should have precluded relitigation of the economically

viable uses issue in the federal district court.[5] "It is now well established that . . . a federal court must give the same full faith and credit to the records and judicial proceedings of any state court that they would receive in the state from which they arise." *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1060 (11th Cir.1987) (citing 28 U.S.C. § 1738). The preclusive effect of state judgments in federal court is determined, in the first instance, according to principles of state law. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1332, 84 L.Ed.2d 274 (1985) ("This statute [28 U.S.C. § 1738] directs a federal court to refer to the preclusion law of the State in which judgment was rendered."). In Florida, "collateral estoppel applies when the identical parties wish to relitigate issues that were actually litigated as necessary and material issues in a prior action." *Carson v. Gibson*, 638 So.2d 79, 81 (Fla.Dist.Ct.App.1994) (citing *Albrecht v. State*, 444 So.2d 8 (Fla.1984)).

Here, NPL has failed (at the least) to satisfy the "necessary and material" element of the issue preclusion analysis. The state court decided that Florida law offered no relief to the victims of temporary regulatory burdens imposed in good faith and that Monroe county did act in good faith. *See NPL I*, 985 F.2d at 1491 & n. 4. Thus, whether or not there remained economically viable uses, an independent and sufficient legal basis for the state

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[5] The state court said that the "The only permitted use in said zoning district is a private airport. . . . This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use."

court's holding that no compensation was due existed: Florida law provided no remedy. Given this legal conclusion, there was no need for the state court to decide whether or not economically viable uses had existed. Because NPL has failed to satisfy the "necessary and material" requirement, Defendants were properly permitted to introduce in the district court testimony on other economically viable uses.[6] We affirm the district court's determination that other economically viable uses of the property existed.

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[6] We note also that it is unclear from the state court opinion that the judge was even addressing the takings claim, and so it is doubtful that Plaintiffs could succeed in satisfying the "actually decided" element either. We need not conclusively resolve this issue, in view of the "necessary and material" analysis, but we note that in general a federal court will not confer preclusive effect on a state court order where it is unclear what the state court actually decided. *See Paine-Webber Inc. v. Farnam*, 870 F.2d 1286, 1287 (7th Cir.1989) ("We now hold that the vagueness of the state court order renders . . . collateral estoppel doctrine[ ] . . . inapplicable."). The state court order here is vague because there is no discussion of what is an economically viable use for takings purposes and because, as noted above, Florida's lack of remedy caused factual findings on economically viable uses to be unimportant – making it unlikely that the state court was doing more than making a passing observation.

In addition, because we conclude the Florida courts would not accord preclusive effect, it is unnecessary to consider whether an exception to section 1738 would defeat the state law grant of preclusion. *See generally Marrese*, 470 U.S. at 383, 105 S.Ct. at 1333 ("The issue whether there is an exception to § 1738 arises only if state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding.").

D. Good Faith Reliance

NPL argues that it acted "in good faith reliance upon the existing residential zoning," and, therefore, the County was equitably estopped from rezoning the property to preclude residential development (or required to pay compensation if it did so rezone). NPL relies chiefly on *Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (5th Cir. Unit B. 1981), and *A.A. Profiles, Inc. v. City of Fort Lauderdale,* 850 F.2d 1483 (11th Cir.1988). NPL's argument is essentially that it spent a great sum of money to purchase the property, which it would not have done but for the residential zoning.

NPL's argument fails. Both *Wheeler* and *A.A. Profiles* contained a critical element that is missing from the facts of this case. In both cases, the local government took affirmative steps – by granting a permit or passing a specific resolution approving the project later precluded by rezoning – beyond the mere creation of the earlier zoning map. The panel in *A.A. Profiles* noted, "*Wheeler* is indistinguishable from this case. The original resolution [approving the project] granted appellant a property interest. . . . " 850 F.2d at 1488 (footnote omitted).

Here, Plaintiff failed to allege any affirmative act by the County sufficient to grant a commensurate "property interest." Plaintiff merely alleges that it paid a lot of money for property that the zoning plats indicated was suitable for residential development. That in itself is insufficient to invoke the rule of *Wheeler* and *A.A. Profiles. Cf. A.A. Profiles,* 850 F.2d at 1488 ("We note also that although the taking did not occur simply because appellant expended a great amount of money to begin the

project, this expenditure in reliance on the resolution underscores the importance of the original resolution."). Because there is no general constitutional right to be free from all changes in land-use laws, *see Lakeview Development Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1295 (9th Cir.1990), NPL must do more than rely on the original zoning to establish an equitable estoppel. It has not done so, and is entitled to no compensation.[7]

III. The Substantive Due Process Issues

NPL argues the property was so patently unsafe for use as an airport that the rezoning constituted a violation of their "substantive" rights under the due process clause.[8] To prove a due process violation, NPL must show that the rezoning was "clearly arbitrary and unreasonable, having no substantial relation to the public health,

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[7] Because we reject each of Plaintiff's takings arguments on the merits or on ripeness grounds, we need not discuss the contention that the district court erred in its calculation of the applicable takings period. Also, we need not address the controversy over the import of NPL's sale of the property in 1982 to its principals (in what NPL referred to at argument as a "business divorce"). *See generally NPL I* at 1490-91. The takings period allegedly lasted from 1980 (the rezoning) to 1986 (the invalidation of the rezoning). NPL was the owner during the earlier part of this period and, thus, has standing here. Perhaps the sale of the property could have shortened the takings period for NPL (and so reduced NPL's potential damages), but we need not address this issue because we conclude that as a matter of law there was no violation of the Fifth Amendment and no damages are to be awarded.

[8] NPL apparently argued below that its procedural due process rights were violated, but makes no such argument here.

safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926).

Nothing clearly arbitrary and unreasonable has been shown about the zoning here. The record at trial established beyond question that, first, the properties in question were created for use as an airport (NPL's counsel admitted as much at argument), and second, that the strip did in fact function as an airport for some time both before the rezoning (that is, the land's historical use was as an airport) and after. Knowledge of these facts, which we presume the zoning entities to have had, is sufficient in itself for us to conclude that local officials violated no substantive due process right by the rezoning effort. *See South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir.1974) (en banc) ("A zoning commission is a quasi-legislative body. . . . Its actions are entitled to a presumption of validity."). The Federal Constitution does not empower courts to sit just to second-guess legislative judgments on technical matters like airport safety. The substantive due process claim fails.

We note in addition that NPL's argument – that the airport zoning was irrational because of safety concerns – refers only to the existing, not the possible, uses of the property as an airport. Appellants fail to press the assertion that no safe runway ever could be constructed on the property. For these reasons, judgment on the substantive due process claim was properly awarded to Defendants.

IV. The Jury Trial Issues

NPL contends that contested factual issues required the empaneling of a jury on both the Fifth Amendment takings claim and the Fourteenth Amendment substantive due process claim. We reject these arguments.

No jury trial was required for the substantive due process claim. This court addressed the division of labor between judge and jury on substantive due process claims for zoning cases in *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570 (11th Cir.1989). There, we held that "the ultimate issue of whether a zoning decision is arbitrary and capricious is a question of law to be determined by the court." *Id.* at 1578. We went on to point out, however, that "subsidiary facts" in the substantive due process analysis, such as what motivated the denial of a building permit, "are properly for the factfinder." *Id.* at 1578 & n. 15. Thus, certain questions in substantive due process zoning cases may on occasion require the empaneling of a jury.

NPL, however, cannot complain here that material "subsidiary facts" were improperly decided by the judge, because there were no material facts in contention below. In substantive due process challenges to zoning laws, we recognize, as noted above:

> A zoning commission is a quasi-legislative body. . . . Its actions are entitled to a presumption of validity. The only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare.

South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir.1974) (en banc), *quoted in Greenbriar*, 881 F.2d at 1577 n. 14. In the light of the great deference accorded the quasi-legislative body in zoning cases, that NPL's property was actually conceived as and later used as an airport before the PA rezoning precludes, as a matter of law, a determination that the PA rezoning was an act so dangerous as to be clearly arbitrary and unreasonable. *See generally Hoeck v. City of Portland*, 57 F.3d 781, 786 (9th Cir.1995) (concluding that "as a matter of law, no reasonable jury could find that the City has acted in an [sic] clearly arbitrary and unreasonable manner") (applying rule of *Village of Euclid*, 272 U.S. at 395, 47 S.Ct. at 121). Because no material, subsidiary fact was in issue, the trial judge was justified in resolving the substantive due process issue himself.

On the regulatory takings claim NPL has asserted, but failed to support with any case, the proposition that subsidiary facts must be decided by a jury.[9] We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury. In *United States v. Reynolds*, 397 U.S. 14, 18, 90 S.Ct. 803, 806, 25 L.Ed.2d 12 (1970), for example, the Supreme Court noted that "it has long been settled that there is no constitutional right to a jury in eminent domain proceedings." And, contrary to NPL's

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[9] In fact, counsel for NPL originally represented to the district court that "the issues relating to taking other than damages are for the Court. The damages issue is for the jury."

contention, a recent panel opinion of this court (since vacated) noted, we think correctly, that no jury factfinding is required in regulatory takings cases. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1550 (11th Cir.1994), *vacated*, 42 F.3d 626 (11th Cir.1994) ("[T]he court determines all issues, legal and factual, in an inverse condemnation suit, save the question of just compensation. . . . "). We agree with the district judge's determination that no jury had to be empaneled for the regulatory takings claim.

Because the district court committed no reversible error, the judgment below is AFFIRMED.

APPENDIX B

New Port Largo, Inc. v. Monroe County
873 F.Supp. 633 (S.D. Fla. 1994)

NEW PORT LARGO, INC., Plaintiff,

v.

MONROE COUNTY, Defendant.

No. 87-10043-CIV-KING.

United States District Court,
S.D. Florida.

Dec. 21, 1994.

Landowner brought action alleging a temporary regulatory taking of its property by virtue of rezoning to private airport. The District Court, James Lawrence King, J., held that: (1) Fifth Amendment claim was not ripe; (2) there was no taking of the property; and (3) there was no denial of procedural or substantive due process.

Judgment for defendant.

Jeffrey B. Crockett and Michael R. Seward, for plaintiff.

Alan G. Greer, James Hendrick and Randy Ludacer, for defendants.

MEMORANDUM OPINION

JAMES LAWRENCE KING, District Judge.

New Port Largo, Inc. brought this action, alleging a temporary regulatory "taking" of its property by Monroe County, on July 7, 1987. The Plaintiff seeks compensation for an alleged regulatory taking pursuant to the Just Compensation Clause of the Fifth Amendment to the United States Constitution as made applicable to the states by the Due Process Clause of the Fourteenth

Amendment. The Plaintiff asserts further claims for monetary damages for the unlawful regulatory taking under 42 U.S.C. § 1983 (1988) for violation of substantive and procedural due process rights.

New Port Largo, Inc. contends that Monroe County effected a temporary taking of its property and violated its civil rights by (1) creating a new zoning classification throughout the County of "PA-Private Airport" on June 5, 1979, and (2) rezoning Plaintiff's property from RU-2 to Private Airport Use (PA) on September 11, 1980.[1]

I. FINDINGS OF FACT

A. CASE HISTORY

The property in question consists of twenty-five residential oceanfront lots,[2] dredged from the ocean to create

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[1] This case has been extensively litigated in both the federal and state courts. *See New Port Largo, Inc. v. Monroe County,* 706 F.Supp. 1507 (S.D.Fla.1988), *vacated,* 985 F.2d 1488 (11th Cir.1993), *cert. denied* ___ U.S. ___, 114 S.Ct. 439, 126 L.Ed.2d 373 (1993); *New Port Largo, Inc. v. Monroe County,* 856 F.Supp. 659 (S.D.Fla.1994); *New Port Largo, Inc. v. Monroe County,* Case No. 80-1164 (Fla.Cir.Ct., Jan. 2, 1986) (Lester, J.); *Monroe County v. New Port Largo, Inc.,* Case No. 82-432 (Fla.Cir.Ct., Mar. 27, 1984) (Knuck, J.), *aff'd* 467 So.2d 757 (Fla.Dist.Ct.App.1985); *Petition for Writ of Mandamus denied,* (11th Cir., Oct. 7, 1994) (No. 9450-31).

[2] Consistent with its original intended use as an airport, the property is 2,400 feet long and 150 feet wide. It is a long narrow stretch of land separating the Atlantic Ocean from a deepwater dredged canal. The residential lots are platted side by side along the length of the original runway, extending across the 2,400 foot length of the 9.65 acres from the Atlantic Ocean to the deepwater dredged canal to the rear of each lot. *See* Diag. 1.

a landing strip for an airport and a breakwater for an upland subdivision on Key Largo, Florida.

In August, 1968 the State of Florida sold the submerged land in question to a private trust for $4,000.

In presenting the matter to the Florida Cabinet (sitting as trustees of the Florida Internal Improvement Trust Fund), agents of the Trust, stated that the land dredged from the ocean bottom would be used to construct an airport landing strip for use by the citizens of the upper Florida Keys. The airport property, once the dredging, filling and paving of the runway were completed by the Trust developers, would be deeded to Monroe County for use as a public airport. An additional benefit to the public was the breakwater protection for the adjoining mainland property of approximately 150 property owners. The County joined the Trust developers in seeking approval from the Florida Cabinet for sale of the submerged lands. The sale was approved and a dredging permit issued by the Cabinet in August, 1968.

At that time, the Trust owned the upland property known as Port Largo, primarily consisting of platted waterfront residential lots on finger canals. The granting, by the Florida Cabinet (I.I. Board), of a dredging permit was valuable to the Trust developers for the dual purpose of obtaining the land fill necessary to construct the runway – breakwater, and to provide a deep water access canal to the finger canals of the subdivision development on the upland property. The Trust proceeded to dredge the deepwater canal which connected all the finger canals of the subdivision lots to the ocean and to create the breakwater lots. This was done at the expense of the

private trust after Monroe County backed out of an oral understanding they had with the Trust developers to share in the cost of dredging the deepwater canal and construction of the airport landing strip.

The Trust developers, having obtained the land and permission to dredge the access canal that was vital to the development of the subdivision's finger canals, proceeded to dredge the canal and fill the land to create the breakwater which exists today. An airport known as the Port Largo Airport, operated on the breakwater from at least 1971 to early 1985. The airport was operated continuously throughout this period of time on lease arrangements between the airport operators and the Trust.[3] Under the lease, the Trust owners of the property received rental payments from the operators of the airport.

In 1972, the breakwater property was zoned by Monroe County as RU-2 Residential.[4] On January 29, 1973 the lease operator of the Port Largo Airport applied for a change in the zoning of the property from RU-2 to BU-2, permitting the operation of the property as an airport.

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[3] The Port Largo Airport was continuously licensed by the State of Florida from at least 1974 to 1985. The licenses issued to the airport state that "[w]hen inspected, this airport met State Airport Standards for Public Use. Safe Air Traffic Patterns have been developed for this and other licensed airports in this vicinity. This license is revokable if unsafe conditions develop or for other reasons stated in the State Airport Licensing Law or the Rules and Regulations adopted thereunder."

[4] The RU-2 zoning classification "is intended to provide residential areas in which duplexes may be constructed and occupied". Monroe County, Fla.*Code* § 19-196 (1987).

The property owners consented to the request by their lessee to the proposed change in zoning of the breakwater property.

The Monroe County Zoning Board denied the requested zoning change on March 23, 1973, but granted a variance from the existing RU-2 zoning "to operate an airport and facilities."

On June 5, 1979, the Monroe County Board of Commissioners enacted Ordinance 14-1979, which created a new zoning classification within the County of PA, or Private Airport.[5] Prior to this, there was no zoning classification in the Monroe County zoning classifications specifically pertaining to airports.

On January 30, 1979, New Port Largo, Inc. ("NPL"), the Plaintiff in this litigation, entered into a purchase and sale agreement to buy the Fourth and Fifth Additions of the Port Largo subdivision in Key Largo, Florida for $3,200,000. The entire property consisted of sixty-three acres, which included approximately 9.65 acres that encompassed Lots # 535-560. The Court will refer to Lots # 536-560 as the "breakwater property" or the "breakwater lots."

On September 1, 1979, NPL purchased the Fourth and Fifth Additions, including the breakwater lots from

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[5] Ord. No. 14-1979 (later codified as §§ 19-295 to 19-302 of the Monroe County *Code*) provided that "[t]he provisions of this article shall apply to all presently existing private airports in Monroe County, as well as to all private airports which may be established in Monroe County hereafter." The ordinance also stated that "[t]he purpose of these regulations is to ensure the continued use of existing private airports".

the private Trust. NPL bought the breakwater property subject to an airport lease that was to expire on July 14, 1982. At the time of the purchase, the breakwater property was zoned RU-2 with a variance for airport use and had been used as an airport since at least 1971.

In November 1979, Monroe County (the County) filed an application with the Zoning Department to rezone the property from RU-2 to private airport use (PA). On January 24, 1980, the Zoning Department held a hearing on the proposed rezoning and subsequently approved the County's application.[6] NPL appealed the Zoning Department's decision to the Monroe County Board of Commissioners (the Commission). On September 11, 1980, the Commission affirmed the Zoning Department's decision.

B. LITIGATION HISTORY

On October 10, 1980, NPL filed a petition for a writ of certiorari in state circuit court alleging that the rezoning violated Florida law. NPL claimed that the County had not complied with the procedural requirements of its Major Development Project Ordinance, an ordinance that

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[6] The Ordinance limited the use of land in or adjacent to a PA district. It provided that "[t]he zoning director shall not give zoning approval for any building permits for any structure to be located within or adjacent to any private airport area if, when built, said structure would constitute a violation of the protective provisions of this article." It also provided that "[w]ithin or adjacent to the PA district, no establishments or uses that emit smoke, gas or dust in quantities or densities sufficient to jeopardize the safe use of private airports shall be allowed."

applies to rezonings which, as here, concern parcels of land greater than five acres. On September 9, 1982, during the pendency of its certiorari petition in the state court, the Plaintiff NPL sold the property in question for a profit, conveying one-half undivided interests in fee simple both to TFW, Inc., a Florida corporation, and to a land trust administered by the First National Bank of South Miami. Neither of these purchasers intervened in the certiorari proceeding brought by NPL and Plaintiff did not apprise the state court of the fact that it had sold the property.

In August 1985, NPL amended its petition to include a claim that the County had deprived NPL of its property "without offering compensation . . . in violation of the constitutions and laws of the United States and of the State of Florida". NPL also claimed that the rezoning did not comply with the dimensional requirements and safety regulations for a private airport. NPL asked the court to declare the rezoning invalid, to return the property to its RU-2 zone classification, and to provide any further relief the court deemed appropriate.

The state certiorari proceeding was stayed pending the final resolution of a second lawsuit. This lawsuit, instituted by Monroe County in early 1982, sought the imposition of a constructive trust on the breakwater property for the benefit of Monroe County on the strength of Darryl Sheley's representations years earlier. On March 27, 1984, the Florida Circuit Court entered judgment in favor of Plaintiff and against Defendant Monroe County in the constructive trust lawsuit. That judgment was affirmed on appeal. *Monroe County v. New Port Largo, Inc.*, 467 So.2d 757 (Fl.Dist.Ct.App.1985).

On January 2, 1986, the state court granted NPL's petition to invalidate the rezoning ordinance.[7] The Court found that the County's rezoning of the property to PA violated the dimensional requirements of a private airport zone and that the County had not complied with the procedures of its Major Development Project Ordinance. Accordingly, the court declared invalid and quashed the County's rezoning of the subject property. Because the court found that the County had acted in good faith in pursuing the rezoning, however, it did not award damages to NPL. Neither party sought appellate review of the court's decision.

After the successful zoning challenge, NPL filed the instant suit in United States District Court in 1987, raising Fifth Amendment and 42 U.S.C. § 1983 claims. On November 21, 1988, this Court found that NPL's claims were barred by a four year statute of limitations. *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D.Fla.1988). Five years later, in 1993, the Eleventh Circuit Court of Appeals reversed, holding that NPL's regulatory takings claims were not time-barred. *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir.1993) ("New Port Largo I").

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[7] Defendant urges the Court to disregard the factual findings made by State Circuit Judges Lester and Knuck in the two state court proceedings. Defendant reasons that these opinions are not entitled to full faith and credit because NPL was not the real party in interest in those proceedings as a result of its sale of the breakwater property to TFW, Inc. and First National Bank Trust.

Upon remand this Court bifurcated the issues of liability (takings issue) and damages. A bench trial on the alleged temporary takings issue was held first, to be followed by a jury trial on damages. NPL appealed the Order of Bifurcation by filing a Petition for Writ of Mandamus on October 4, 1994. The Eleventh Circuit denied NPL's application for Writ of Mandamus on October 7, 1994. *New Port Largo, Inc. v. Monroe County, Petition for Writ of Mandamus denied,* (11th Cir. Oct. 7, 1994) (No. 94-5031). Following denial of mandamus, this court conducted an eight day non-jury trial on the takings issue.

II. CONCLUSIONS OF LAW

A. RIPENESS

"[R]ipeness is a question of subject matter jurisdiction" which must be considered by the Court whether or not the parties raise the issue. *Reahard v. Lee County,* 978 F.2d 1212, 1213 (11th Cir.1992) ("Reahard II") (citing *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1573 n. 7 (11th Cir.1989) and *Fitzgerald v. Seaboard System R.R.,* 760 F.2d 1249, 1251 (11th Cir.1985)). If Plaintiff's regulatory takings claim "could be satisfied through adequate state judicial procedures," Plaintiff has not stated "a ripe federal claim under *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), and there is no subject matter jurisdiction." *Reahard,* 978 F.2d at 1213.

In Fifth Amendment just compensation claims, a plaintiff must establish (1) finality of the regulatory taking, and (2) exhaustion of state remedies. Finality was established prior to commencement of this action on July

7, 1987, exhaustion was not. This case was not ripe for federal adjudication when filed, in that North Port Largo, Inc. did not (and has not to this date) sought damages for the alleged temporary taking of its property in the Florida Circuit Court, in inverse condemnation. This state remedy was available under the provisions of the Fifth Amendment to the United States Constitution and Article X of the Florida Constitution. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) *Joint Ventures v. Department of Transp.,* 519 So.2d 1069 (Fl.Dist.Ct.App.1988), *aff'd* 563 So.2d 622 (Fla.1990); *Reahard v. Lee County,* 30 F.3d 1412 (11th Cir.1994) ("Reahard III").

Fifth Amendment takings claims fall into four categories: just compensation, due process takings, arbitrary and capricious due process and equal protection. *Eide v. Sarasota County,* 908 F.2d 716, 720 (11th Cir.1990), *cert. denied,* 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). The type of ripeness analysis undertaken by the court differs depending upon the type of constitutional takings claim involved. Both parties agree that NPL's takings claim falls within the just compensation category. (Rev. Joint Pretrial Stipulation at 1).

1. *Fifth Amendment Just Compensation Takings Claim*

In order to state a ripe regulatory takings claim, a plaintiff/landowner must establish that the state has reached a final decision regarding the regulatory action and that he has exhausted all state remedies to obtain just compensation. *Williamson County Regional Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97, 105 S.Ct. 3108, 3116-22, 87 L.Ed.2d 126 (1985). These two elements have been referred to as "the final decision hurdle and the just compensation hurdle." *Eide*, 908 F.2d at 720. If either one of the elements is missing, subject matter jurisdiction is lacking. *Id.* at 723. A final decision is necessary because the Federal Courts cannot make a determination whether a landowner has been denied all use of his property until the state has "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson*, 473 U.S. at 191, 105 S.Ct. at 3118. The "just compensation" hurdle is necessary because no taking occurs if the state provides just compensation to the aggrieved landowner. *Id.* at 195, 105 S.Ct. at 3121. Both ripeness elements must be satisfied concurrently for Federal jurisdiction to exist.

Recently, the Eleventh Circuit in *Reahard III* found that the Federal Courts lacked subject matter jurisdiction in a regulatory takings case where the *Williamson* prongs were not satisfied concurrently upon removal of the suit to Federal Court.[8] The Court found federal jurisdiction

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[8] In *Reahard*, the defendant removed the suit to Federal Court in 1989, but the final decision hurdle was not met until September 1990, more than one year after removal. *Reahard*, 30 F.3d at 1416. The Eleventh Circuit reasoned that when the Florida Supreme Court issued the *Joint Ventures* opinion, 563 So.2d 622 (Fla.1990), the Reahards lost the just compensation prong because they had not pursued the inverse condemnation remedy available to them in state court.

As discussed *infra*, an inverse condemnation remedy existed in state courts in Florida before the 1990 *Joint Ventures* opinion. Thus, the just compensation prong had not been

lacking after trial, a jury verdict of $700,000, and prior appellate consideration in *Reahard I*, 968 F.2d 1131 (11th Cir.1992), and *Reahard II*.

a. *Finality*

Applying the *Williamson* analysis to the instant case, the Court finds that the case is not ripe for adjudication because NPL has satisfied only the "final decision" hurdle. NPL's takings claim accrued on January 2, 1986 when Judge Lester issued his opinion in the state court proceeding and invalidated the PA zoning change. *See New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1495 (11th Cir.1993). Thus, NPL had a final decision before it instituted this suit in Federal Court in 1987. *Cf. Reahard v. Lee County*, 30 F.3d 1412, 1417 (11th Cir.1994) (finding that Federal jurisdiction did not exist at initiation of suit due to lack of finality).

b. *Just Compensation*

However, while the finality requirement was satisfied, the just compensation hurdle was never met in this case because NPL did not pursue its inverse condemnation claim in state court to obtain compensation for the alleged taking. The Constitution requires that a " 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Williamson*, 473

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satisfied even at the time the case was originally removed from state to federal court in 1989.

U.S. at 194, 105 S.Ct. at 3120 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). Moreover, *Williamson* explicitly states that "no constitutional violation occurs until just compensation has been denied." *Id.*, 473 U.S. at 193 n. 13, 105 S.Ct. at 3120 n. 13. A state compensation procedure "will be deemed available and adequate" under *Williamson*'s just compensation prong "even when that procedure remains unsure and undeveloped." *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2nd Cir.1992); *accord Austin v. City of Honolulu*, 840 F.2d 678, 681 (9th Cir.1988) ("Until the state courts establish that landowners may not obtain just compensation through an inverse condemnation action under any circumstances, Hawaii procedures are adequate within the terms of *Williamson County* and [plaintiff's] failure to use them cannot be excused.").

At the time of the alleged taking[9], Florida did not prohibit inverse condemnation suits. Article X, section 6 of the Florida constitution forbids the taking of private property without full compensation and proper public purpose. *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663, 669 (Fla.1979). Pursuant to this constitutional provision, Florida courts have recognized a cause of action for

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[9] Plaintiff contends that the takings period runs from September 11, 1980 to January 2, 1986, when Judge Lester invalidated the PA zoning. However, in March 1994, this Court limited the takings period to the time from September 11, 1980 to September 9, 1982. *New Port Largo, Inc. v. Monroe County*, 856 F.Supp. 659 (S.D.Fla.1994). September 9, 1992, rather than January 2, 1986, represents the end of the takings period because on September 9, 1982 NPL sold all of its ownership interest in the breakwater lots to Land Trust 741 and TFW, Inc.

inverse condemnation when private property is taken by the state. For example, in *City of Jacksonville v. Schumann*, the Florida courts recognized an inverse condemnation claim where state regulatory action effected a taking without just compensation. *City of Jacksonville v. Schumann*, 167 So.2d 95, 102 (Fla.Dist.Ct.App.1964) ("The constitutional provisions applicable in Florida are consistent with, if they do not affirmatively require, the recognition of the concept of inverse condemnation."), *cert. denied* 172 So.2d 597 (Fla.1965).

A line of cases recognizes that Florida law permits a landowner to bring inverse condemnation claims for rezoning. *See Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1542 (11th Cir.1991) (district court in 1988 properly dismissed takings claim because plaintiff failed to bring inverse condemnation claim in state court to obtain just compensation), *cert. denied* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377, 1382, 1388 (Fl.Dist.Ct.App.1994) (finding that an inverse condemnation claim for regulatory taking was properly filed in 1987, although plaintiff failed to demonstrate that taking had occurred and four year statute of limitations for inverse condemnation action had expired).

Inverse condemnation for regulatory taking has been available in Florida for denial of a permit which deprives an owner of any reasonable use of the property. *Key Haven Assoc. & Board of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153 (Fla.1982). *See Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1518 n. 6 (11th Cir.1987) ("A separate action in inverse condemnation for an

uncompensated, although valid, permit decision amounting to a taking, will lie."), *aff'd*, 904 F.2d 585 (11th Cir.1990), *aff'd in part, rev'd in part*, 997 F.2d 1369 (11th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994).

In 1987, the Supreme Court recognized that the Fifth Amendment's Just Compensation Clause requires states to provide compensation for temporary regulatory takings. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). In *First English*, the state court struck the portion of the plaintiff's inverse condemnation claim that requested money damages for a regulatory taking. The Supreme Court found that the Fifth Amendment required money compensation, not just injunctive relief, and remanded the case to state court. Thus, the Supreme Court implied that states must provide an inverse condemnation remedy for temporary regulatory takings.

In 1988, relying on *First English*, the First District Court of Appeal issued an opinion expressly holding that inverse condemnation existed for regulatory takings in Florida. *Joint Ventures, Inc. v. Department of Transp.*, 519 So.2d 1069, 1071 (Fl.Dist.Ct.App.1988). "Thus, the court in *First Lutheran Church [First English]* recognized that when a taking occurs, independent of any statutory authorization a landowner has a constitutional right to file an action in inverse condemnation in an appropriate forum, which in this state could be the circuit court." *Id.* (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)). The Florida Supreme Court affirmed the District Court of Appeal in its 1990 *Joint Ventures* opinion. *Joint*

Ventures, Inc. v. Department of Transp., 563 So.2d 622 (Fla.1990); *Reahard v. Lee County*, 30 F.3d 1412, 1417 (11th Cir.1994) (stating that Florida Supreme Court resolved ambiguity in law by explicitly recognizing inverse condemnation cause of action).[10]

In *New Port Largo I*, the Eleventh Circuit stated "[a]t the time of the state circuit court's final judgment, Florida courts did not recognize damages claims arising from regulatory takings." *New Port Largo*, 985 F.2d 1488, 1493 (11th Cir.1993) (citing *Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213 (Fla.1984)).[11] The Eleventh Circuit might reach a different conclusion today in light of the United States Supreme Court's decision in *First English* and the Florida Supreme Court's decision in *Joint Ventures*, which overruled the *National Bulk Carriers* line of cases.

NPL thus had a remedy in state court to obtain just compensation. The Florida courts explicitly recognized this remedy in January, 1988. *See Joint Ventures, Inc. v.*

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[10] Several cases have recognized the *First English* rule in Florida. *See Villas of Lake Jackson v. Leon County*, 796 F.Supp. 1477 (N.D.Fla.1992); *Barima Investment Co. v. U.S.*, 771 F.Supp. 1187 (S.D.Fla.1991), *aff'd* 959 F.2d 972 (11th Cir.1992); *Monroe County v. Gonzalez*, 593 So.2d 1143 (Fla.Dist.Ct.App.1992).

[11] In *Dade County v. National Bulk Carriers, Inc.*, the Florida Supreme Court held that an inverse condemnation action was "not necessary" and that a suit to invalidate the rezoning was the proper remedy. The Second District Court of Appeal then extended the *National Bulk Carriers* holding to find that "a zoning change cannot give rise to a cause of action for inverse condemnation." *Grady v. Lee County*, 458 So.2d 1211, 1212 (Fla.Dist.Ct.App.1984); *see also Lee County v. Morales*, 557 So.2d 652, 656 (Fla.Dist.Ct.App.), *rev. denied*, 564 So.2d 1086 (Fla.1990).

Department of Transp., 519 So.2d 1069, 1071 (Fla.Dist.Ct.App.1988), *aff'd* 563 So.2d 622 (Fla.1990). NPL's takings claim does not meet the second *Williamson* prong. Therefore, NPL's just compensation claim is not ripe because NPL failed to pursue an inverse condemnation remedy in state court to obtain just compensation for the alleged taking.

2. *Due Process Claims*

Although the Court lacks jurisdiction to consider the Fifth Amendment takings claim, an independent basis of subject matter jurisdiction exists with respect to the due process claims. A procedural due process claim is not a claim for money damages and therefore the issue of inverse condemnation is irrelevant. A final decision is the only requirement for a ripe procedural due process claim. NPL has satisfied that requirement.

Substantive due process claims under § 1983 arise the moment a governmental body acts in an arbitrary or capricious manner and applies that arbitrary action to a landowner's property. *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547 (11th Cir.1994); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n. 8 (11th Cir.1989). This is true regardless of whether the landowner is later compensated for the arbitrary and capricious governmental action. *Id.* Although the Eleventh Circuit in *Corn I*[12] suggested that both finality and denial

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[12] *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 n. 2 (11th Cir.1987), *aff'd*, 904 F.2d 585 (11th Cir.1990), *aff'd in part*,

of just compensation were prerequisites to bringing a § 1983 substantive due process claim, the Eleventh Circuit later expressly rejected that argument. *Greenbriar,* 881 F.2d at 1574 n. 8. Here, NPL's substantive due process claim became ripe when Judge Lester issued his opinion on January 2, 1986. Consequently, NPL's procedural and substantive due process claims under § 1983 are ripe for review by this Court.

B. COUNTY'S LIABILITY

This Court recognizes that a prior opinion in this same case is binding on the trial court as the law of the case. For that reason, and following the mandate of *New Port Largo I* to proceed with this litigation on remand, the Court will therefore examine the merits of the Fifth Amendment takings claim.

1. *Fifth Amendment Taking*

The Fifth Amendment prohibits the taking of private property for public use without just compensation.[13] This guarantee is "designed to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a

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rev'd in part, 997 F.2d 1369 (11th Cir.1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994).

[13] It is well settled that the Fifth Amendment applies to the states through the Fourteenth Amendment. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978) (citing *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897)).

whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). However, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). Thus, not all governmental regulation which affects property values will constitute a Fifth Amendment regulatory taking.

Under the Fifth Amendment, a regulatory action must be for a valid public purpose or a taking will occur.[14] *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). The Supreme Court held that even when the government acts with a valid public purpose, the state must compensate the landowner where there is physical invasion of the subject property or where the regulation deprives a landowner of all economically beneficial or productive use of land. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, ___, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992).[15]

a. *Physical Invasion of Land*

Plaintiff argues that Monroe County, by changing the zoning from RU-2 to PA, forced NPL to operate a public

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[14] The Court finds that Monroe County acted for a valid public purpose. *See infra* II.B.2.b.

[15] In *Lucas*, the Supreme Court suggested that the rationale for compensating a property owner who loses all economically beneficial use of land due to regulation is that the government action is equivalent to a physical appropriation. *Lucas*, ___ U.S. at ___, 112 S.Ct. at 2894.

airport for the County at NPL's expense, thereby invading the land and appropriating the property for public use. Plaintiff interprets the PA zoning ordinance to require the landowner to operate an airport that is open to the general public. The Court finds this argument to be without merit. The PA zoning did not affirmatively require NPL to operate an airport on the breakwater lots. The zoning ordinance *allowed* a business person to operate a private airport for use by business invitees.[16] During the period of PA zoning, NPL's breakwater lots were never physically invaded. Because there was no physical invasion, the Court must inquire whether the state action deprived NPL of all or substantially all economically viable use of the land.

b. *Deprivation of All Economically Viable Use of Land*

To determine whether state action deprives "a landowner of all economically viable use of his property," the Court examines "the economic impact on the claimant and the extent to which the regulation interferes with investment-backed expectations." *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir.1994) (citing *Bowen v. Gilliard*, 483 U.S. 587, 606, 107 S.Ct. 3008, 3020, 97 L.Ed.2d 485 (1987)). "The ad hoc, case-by-case inquiry which accompanies this determination requires no more than an application of the law to the facts." *Id.*

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[16] The Ordinance defines "private airport" as "an airport used primarily by the licensee, but available for use by invitation of licensee[s]". Ord. No. 14-1979 (later codified as Monroe County, Fla.*Code* § 19-196).

Applying the law to the facts of this case, the Court finds that a temporary taking did not occur when Monroe County rezoned the breakwater lots from RU-2 (with an airport variance) to PA.

i. *Economic Impact*

The Court finds that the rezoning's effect on NPL did not deprive NPL of all economic use of the property. Economically viable alternative uses of the property existed under the PA zoning. Plaintiff contends that the only permissible use under PA zoning was the operation of a private airport, which Plaintiff contends, generates minimal revenue and renders the land worthless. However, this argument is premised on the assumption that the only use allowed under PA zoning is airport operation.

The PA zoning ordinance limits certain uses of land in or adjacent to a PA-zoned area: "[t]he zoning director shall not give zoning approval for any building permits for any structure to be located within or adjacent to any private airport area if, when built, said structure would constitute a violation of the protective provisions of this article." Ord. No. 14-1979. Activities that "emit smoke, gas or dust in quantities or densities sufficient to jeopardize the safe use of private airports" violate the protective provisions of the ordinance. *Id.* The County Ordinance permitted any use of the property not inconsistent with these limitations.

Defendant's witness presented extensive testimony of economically viable uses the property owner could have made of the breakwater lots consistent with PA

zoning. The witness testified that NPL could have operated the airport profitably, constructed and sold condominium boat slips on the deepwater canal, rented dry dock storage or established a beach club for rental or sale to the upland property owners; all of which is consistent with, and not proscribed by, the zoning ordinance.

Based on the expert testimony presented, the Court finds that an airport could be operated profitably on the breakwater lots. The existing airport lease did not provide NPL with substantial income. However, Defendant's evidence reveals that the airport could have been operated profitably. Through effective marketing and advertising, an airport operator could generate significant revenue from fuel sales, airplane tie-downs and landing fees.

Defendant's proof was clear and convincing that NPL could have sold the PA-zoned land to a developer who would have constructed condominium boat slips along the canal side of the property. The canal channel is sufficiently wide to accommodate bulkheading of the property and construction of boat slips. Indeed, nearby lots were used as a marina, operating off this same canal. Such a sale would have provided Plaintiff with a significant profit. Defendant's appraisal expert, Mr. Canon, testified, and the Court finds, that the present value as of September 11, 1980 of the PA-zoned breakwater lots was $1,280,000 to a single purchaser who would construct and develop the boat slips.[17] Mr. Canon further testified that

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[17] Mr. Canon's calculations excluded consideration of the Army Corps of Engineer's dispute which, according to Mr.

this use would be more profitable than selling the land as unimproved lots with RU-2 zoning. Mr. Canon estimated that the present value as of September 11, 1980 of the RU-2-zoned property was $980,000 if sold for residential construction. Plaintiff's expert, Mr. Grayser, testified that the RU-2-zoned breakwater lots were worth at least $1,700,000 and possibly more. The value difference between the $1,700,000 and $980,000 figures for the RU-2-zoned breakwater lots does not alter the economic value analysis under *Penn Central*, *Lucas* and *Highland Beach* because the lots had a value of $1,280,000 after the rezoning to PA and this does not deprive NPL of "all or substantially all" value.

Another proffered use was the sale of the breakwater property to the Port Largo homeowners for recreational purposes. The homeowners could construct and organize a beach club that would include tennis courts and swimming facilities. The construction of a beach club would also enhance the value of NPL's remaining interior lots in the Fourth and Fifth Additions. This is all consistent with PA zoning. During this time period the Upper Florida Keys experienced a shortage of boat storage space. The record establishes that the breakwater lots had value as dry storage for boats.[18]

Netter, impeded the sale of the property. NPL settled the dispute on October 14, 1981 and paid the Army Corps of Engineers $500,000. *See infra* text accompanying note 20. For this, and other reasons, the Court finds the testimony of Defendant's experts on value to be the more believable.

[18] Defendant suggested that the breakwater had economic value simply as a land mass which protected the inland lots from storm surge and prevented silting of the canals. However,

The Court finds that the highest and best use of the property was residential development, but finds that significant value existed under the PA zoning due to the proven alternative non-airport uses. Therefore, NPL, unlike the plaintiff in *Lucas*, could have availed itself of alternative, economically viable uses of the property and did not suffer a substantial adverse economic impact.

ii. *Investment-backed Expectations*

The Court next examines whether the rezoning interfered with NPL's reasonable investment-backed expectations. NPL's investment-backed expectation in purchasing the breakwater property was to profit from resale of the property. NPL did not purchase the property with any intention to improve the property, but instead planned to resell the land as undeveloped lots. NPL presumably intended to sell the lots with the existing zoning, RU-2 with an airport variance, and subject to the airport lease. During the interim between NPL's purchase of the lots and the rezoning of the breakwater property, NPL did not sell, nor did it execute contracts to sell, any of the breakwater lots.[19] After the rezoning and up to the time NPL sold all its interest in the breakwater lots, NPL had no contracts to sell the breakwater lots. In fact, Mr. Charles Netter, one of NPL's principals, testified that NPL

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this is an intrinsic value of the land and is not an economically viable use of the land.

[19] *See New Port Largo v. Monroe County*, 856 F.Supp. 659 (S.D.Fla.1994) (discussing proposed contracts that NPL submitted as evidence of sales of breakwater lots).

could not sell any of the lots until NPL resolved a dispute with the Army Corps of Engineers regarding dredging and filling that occurred during NPL's development of the Port Largo Subdivision. Mr. Netter testified that NPL could not sell the lots until October 14, 1981, the date NPL signed the consent degree with the Army Corps. Moreover, during the entire takings period, NPL sold only the less valuable inland lots it owned in the Fourth and Fifth Divisions, instead of the more valuable breakwater lots.[20] Therefore, NPL presented no evidence to suggest that prior to the sale to Land Trust 741 and TFW, Inc., NPL's investment-backed expectations were defeated.

When NPL sold the land, it made a profit. NPL's income tax return for the year ending January 31, 1983 reports a profit of $92,860 from the sale of certain breakwater properties to Land Trust 741 and TFW, Inc.[21] Thus, even assuming NPL did not earn as great a profit from the sale of the PA-zoned land as it would have earned from the sale of RU-2-zoned land, NPL nonetheless earned a profit and its reasonable investment-backed expectations were met within the definition of that term in Penn Central and Highland Beach.

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[20] It may be inferred that NPL, which had no contracts to sell the breakwater lots, intended to sell only the less valuable inland lots while the breakwater lots appreciated in value.

[21] The profit may have been greater because the tax return lists only the sale of lots # 537-560 and does not list the sale of lot # 536. Moreover, this was a sale of the property to entities controlled by NPL's principals, Mr. Netter and Mr. Marr. Thus, the sale price may not reflect actual fair market value.

2. *Section 1983 Due Process Claims*

The Court considers two factors in determining whether government action violates an individual's due process rights under 42 U.S.C. § 1983. The Court must determine (1) whether the action deprives the individual of a constitutionally protected interest; and (2) whether the deprivation, if any, occurred without procedural or substantive due process. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir.1989).

In applying this two-part test, the "key inquiry in a case is the second prong of the test. Substantive [and procedural] due process protect[ ] a general right of an individual to be free from the abuse of governmental power." *Rymer v. Douglas County*, 764 F.2d 796, 802 (11th Cir.1985). Assuming arguendo that NPL had a vested property interest in the RU-2 zoning, the Court next examines whether the rezoning violated NPL's due process rights.

A. PROCEDURAL DUE PROCESS

Procedural due process requires adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).

The Monroe County Zoning Board held a hearing on January 24, 1980 to discuss the proposed zoning change

of the twenty-five breakwater lots.[22] Plaintiff alleges that it did not receive written notice of the January 24, 1980 hearing. The testimony of Plaintiff's principals is clear, however, that they received informal notice and did, in fact, attend the hearing accompanied by attorneys and an independent court reporter. On January 24, 1980, the Monroe County Zoning Board voted 4-1 to rezone the subject property.

Procedural due process also requires that the individual have a meaningful opportunity to be heard. Plaintiff's complaint alleges that the zoning board was predisposed toward PA zoning before the hearing was held and that this lack of impartiality denied Plaintiff a meaningful opportunity to be heard. Mr. Netter's testimony, however, revealed that in his appearance before the board, both he and Plaintiff's attorneys participated fully in the hearing with examination of witness, presenting evidence and orally arguing their position. At the conclusion of the hearing, Mr. Netter specifically thanked the Board for its fairness and objectivity. Plaintiff has failed to prove that it did not receive adequate notice and did not have a meaningful opportunity to be heard during the rezoning process.

Moreover, Plaintiff appealed the zoning board's decision and attended a hearing before the Monroe County Board of County Commissioners on September 11, 1980. At that hearing, Plaintiff argued the merits of its position

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[22] The actual zoning change only affected lots # 536-560. Lot # 535 was not rezoned. *See* Diag. 2.

and was permitted to present and cross-examine witnesses. Thus, the Court finds that Plaintiff's procedural due process claim is without merit.

B. SUBSTANTIVE DUE PROCESS

Zoning regulations do not violate substantive due process rights unless they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir.1989) (the state, when zoning land, must not act "for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis."); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir.1994).

Plaintiff contends that the County acted with an improper motive when it rezoned the breakwater lots. NPL claims that Monroe County sought to force NPL to operate an unsafe airport in order to avoid the costs, responsibilities and liabilities of operating the airport itself. In pressing its contention that the Board's actions were arbitrary and capricious, Plaintiff also claims that the Board rezoned because of complaints by adjacent property owners who feared that Plaintiff would construct a high-rise condominium that would obstruct their scenic view.

Defendant asserts several bases for its zoning decision, all of which relate to the public health, safety and general welfare. Defendant contends that its motive for rezoning was to improve access to the Upper Florida

Keys,[23] to provide a means for medical air evacuation in the event of a hurricane or other emergency, and to conform the zoning to its historic existing use pursuant to the variance. Furthermore, once Private Airport zoning took effect, the County never forced Plaintiff to assume responsibility for airport operation and Plaintiff never operated the airport itself.

Moreover, a board's attention to constituents' concerns does not deprive a board's decision of a rational basis. A County planning board or City Commission is not a judicial forum. Rather, it is a legislative body that is accountable through the exact democratic processes to which Plaintiff objects. *See Higginbotham v. Barrett*, 473 F.2d 745, 747 (5th Cir.1973) ("[T]he zoning of property . . . involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis.") In *Greenbriar*, the Eleventh Circuit noted with approval the Seventh Circuit's reasoning on this point:

> [N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic . . . government, operations which are permeated by pressure from special interests. . . . The fact 'that town officials are motivated by parochial views of local interests which work against plaintiff's

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[23] Access to the Florida keys is limited to U.S. 1, a single two-lane road. The airport thus offered residents and tourists an alternative means of transportation and helped promote economic development.

> plan and which may contravene state subdivision laws' . . . does not state a claim of denial of substantive due process.

Greenbriar, 881 F.2d 1570, 1579 (11th Cir.1989) (quoting *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir.1988)).

In light of the foregoing, the Court finds that the County's action was substantially related to the general welfare and conformed the zoning to its existing use. Plaintiff has not sustained a section 1983 substantive due process claim because Plaintiff has failed to demonstrate that the Board acted arbitrarily or capriciously in zoning and that the change lacked a rational basis.

III. CONCLUSION

Accordingly, after a careful review of the record, and the Court being otherwise fully advised in the premises, it is

ORDERED, ADJUDGED and DECREED that:

1. Plaintiff's Fifth Amendment takings claim fails because Plaintiff has not demonstrated that the County's rezoning of the breakwater lots deprived NPL of all or substantially all economically viable use of the property;

2. Plaintiff's 42 U.S.C. § 1983 procedural due process claim is without merit because Plaintiff received notice of the hearings and had a meaningful opportunity to be heard;

3. Plaintiff's 42 U.S.C. § 1983 substantive due process claim fails because the County's actions in rezoning the breakwater lots were neither arbitrary nor capricious;

4. For the reasons set forth herein, Monroe County is entitled to the entry of judgment in its favor.

5. Final judgment will be entered by separate order.

DONE and ORDERED.

PORT LARGO

KEY LARGO, MONROE COUNTY, FLORIDA

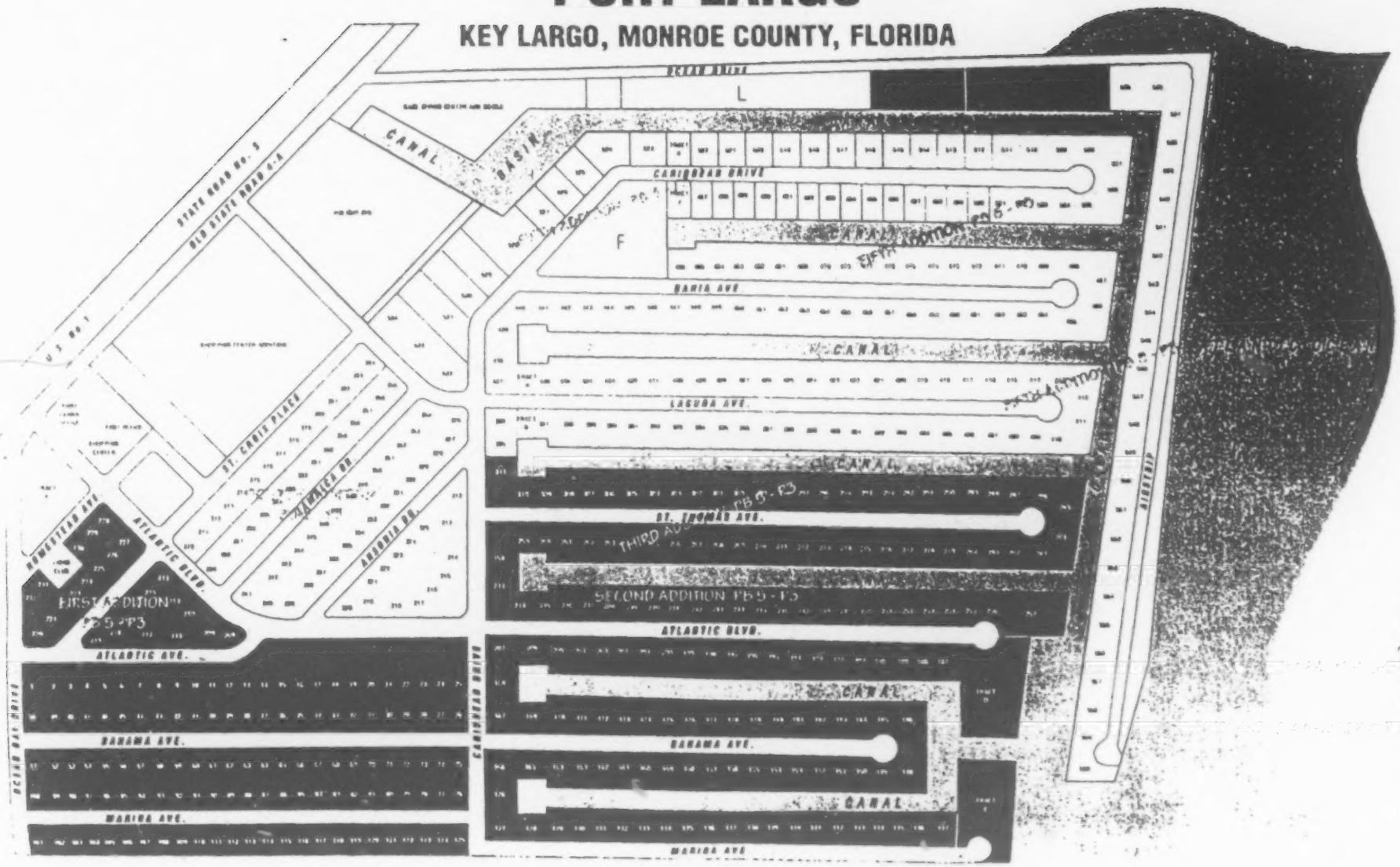

Diagram 1

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APPLICATION FOR PUBLIC HEARING

November 27, 1979

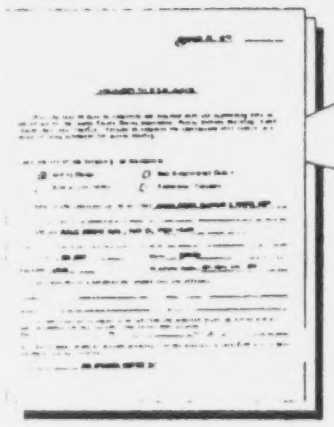

EXHIBIT "A"

**Description of Port Largo Airstrip,
Key Largo, Monroe County, Florida**

A private airstrip (approx. 80' by 2400'), located in a portion of Government Lot 2, Section 33, Township 61 South, Range 39 East, and also the adjoining submerged land as described in T.I.I.F. Deed # 24,873, and being more particularly described as follows:

Inclusive of lots 536 through 560 and the 40 feet wide private road, and excluding the submerged out lots 545 through 559, all part of "Port Largo Fifth Addition", as recorded in Plat Book 6, Page 109 of the Public Records of Monroe County, Florida.

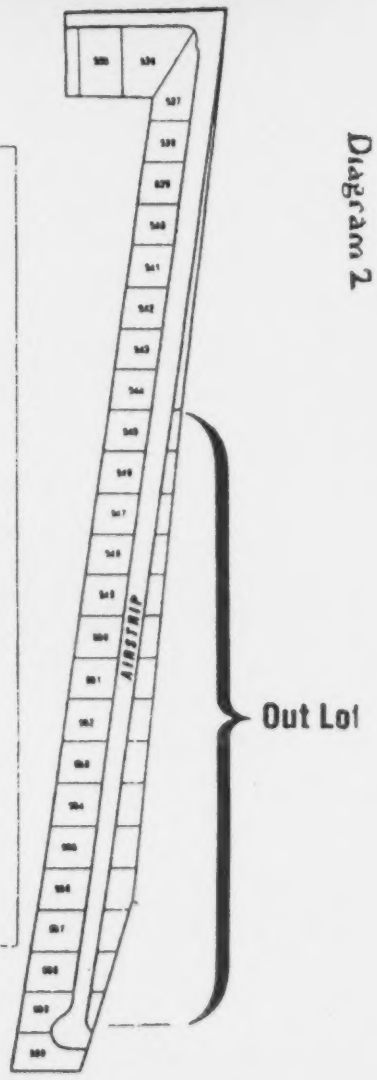

Diagram 2

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APPENDIX C

New Port Largo, Inc. v. Monroe County
Case No. 87-10043-CIV-KING
(S.D. Fla. February 13, 1997)

Order Modifying December 20, 1994
Memorandum Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-10043-CIV-KING

NEW PORT LARGO, INC.,

Plaintiff,

vs.

MONROE COUNTY,

Defendant.

_____/

ORDER MODIFYING DECEMBER 20, 1994 MEMORANDUM OPINION

THIS CAUSE comes before this Court upon Defendant's Motion to Correct Scrivener's Errors, filed on January 17, 1995. The Clerk has advised the Court that no response to the instant motion has been filed and that the time period for filing a response has lapsed.

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendant's Motion to Correct be, and the same is hereby, GRANTED IN PART. This Court's December 20, 1994 Memorandum Opinion is hereby modified in the following manner:

1. Page 7, footnote 7
"First National Bank Trust" is changed to "Land Trust 741"

2. Page 13, footnote 9
"September 9, 1992" is changed to "September 9, 1982"

The Court hereby declines to adopt the other suggested changes contained in Defendant's Motion.

DONE and ORDERED in chamber at the United States District Courthouse, 301 Simonton Street, Key West, Florida, this 17th day of February, 1995.

JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Randy Ludacer, Esq.
James Hendrick, Esq.
Alan G. Greer, Esq.
Michael R. Seward, Esq.
Jeffrey B. Crockett, Esq.

APPENDIX D

New Port Largo, Inc. v. Monroe County
856 F.Supp. 659 (S.D. Fla. 1994)

NEW PORT LARGO, INC., Plaintiff,

v.

MONROE COUNTY, Defendant.

No. 87-10043-CIV-KING.

United States District Court,
S.D. Florida.

April 1, 1994.

Former landowner brought action against county and county officials for temporary regulatory taking. The District Court, 706 F.Supp. 1507, granted summary judgment on limitations grounds, and landowner appealed. The Court of Appeals, 985 F.2d 1488, vacated and remanded. On remand, county again moved for summary judgment, and the District Court, James Lawrence King, J., held that fact issue as to whether county's rezoning of tract from residential to private airport damaged owner precluded summary judgment for county.

Motion denied.

Michael R. Seward, Key Largo, FL, Maurice Jay Kutner, Miami, FL, Robert K. Burlington, Jeffrey B. Crockett, Aragon, Marin, Burlington & Crockett, P.A., Coconut Grove, FL, for plaintiff.

Alan G. Greer, Floyd, Pearson, Richman, Greer, Weil, Brumbaugh & Russomanno, P.A., Miami, FL, Randy Ludacer, County Atty., Key West, FL, James Hendrick, Morgan and Hendrick, Key West, FL, for defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND LIMITING LIABILITY TO THE PERIOD FROM SEPTEMBER 11, 1980 TO SEPTEMBER 9, 1982

JAMES LAWRENCE KING, District Judge.

THIS CAUSE comes to this Court upon Defendant's Motion for Summary Judgment (D.E. # 321), Memorandum of Law in Support (D.E. # 322) and Statement of Material Facts (D.E. # 323), filed January 31, 1994. Plaintiff filed a Memorandum in Opposition on February 24, 1994, and on February 28, 1994, Defendant replied. The issues were fully briefed by the parties and oral argument held.

I. BACKGROUND

A. Case History

This case involves the rezoning of a certain parcel of property located in Key Largo, Florida. Plaintiff purchased the property on September 1, 1979. Two years prior to Plaintiff's purchase, the previous owner leased a portion of the property – the breakwater property – to Key Largo Oceanside Marina & Airport, Inc. to operate and maintain a landing strip and service small planes. The breakwater encompasses Lots 535 through 560. The terms of the lease extended five years until July 14, 1982.[1]

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[1] At the expiration of the five year period, the lease would automatically renew for consecutive one year terms unless either party notified the other of its election not to continue the terms. Thus, the Lease contained an option at the end of the five year term.

When Plaintiff purchased the property, it took title subject to the existing lease. Thereafter, Plaintiff attempted to have the lease invalidated but was unsuccessful.[2]

At the time that Plaintiff purchased the property in September of 1979, the property was zoned RU-2 which was essentially a residential designation that allowed for a private airstrip on the property. On November 27, 1979, almost three months after Plaintiff's purchase, Monroe County's Planning and Zoning Department filed an application to change the zoning on Lots 535 through 560 from RU-2 (residential) to PA (private airport). The designation of PA zoning does not allow for residential development or use.[3] On January 24, 1980, Monroe County rezoned the lots in question PA. Plaintiff challenged the rezoning but, on September 11, 1980, the Monroe County Board of County Commissioners denied Plaintiff's appeal.[4] Plaintiff then filed suit in state court in October of 1980 seeking to invalidate the rezoning. Due to other pending litigation initiated by Defendant, Plaintiff's state court suit was stayed. Not until January 2, 1986 – almost 5 1/2 years later – did the state court resolve the issue in

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[2] On February 13, 1980, Plaintiff filed an Administrative Complaint seeking to block the renewal of the airport's license. Nonetheless, the Florida Division of Administrative Hearings recommended the granting of the airport's license and the Secretary of Transportation adopted it as a Final Order on December 17, 1980.

[3] The only permitted use within a PA district is a private airport which is defined as an airport used primarily by the licensee but available for use by invitation of the licensee.

[4] *See* Resolution No. 1980-234.

favor of Plaintiff, invalidating the rezoning of Lots 535 through 560 from RU-2 to PA.

In the meantime, on September 9, 1982 Plaintiff transferred the entire airport breakwater property to TFW, Inc. and Land Trust 741.

B. Case Posture

Plaintiff filed suit in this Court in 1987 seeking damages for the temporary taking allegedly caused by the rezoning. In 1988, this Court disposed of this cause of action upon summary judgment by holding that Plaintiff's claims were barred by the statute of limitation. *New Port Largo, Inc. v. Monroe County,* 706 F.Supp. 1507 (1988), *vacated,* 985 F.2d 1488 (11th Cir.1993). Almost five years later, the Eleventh Circuit reversed this Court's decision, holding that the statute of limitations on Plaintiff's federal claims was tolled during the period in which Plaintiff litigated its underlying state claims.[5] *New Port Largo, Inc. v. Monroe County,* 985 F.2d 1488 (11th Cir.1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 439, 126 L.Ed.2d 373 (1993). The case now returns to this Court on remand. Plaintiff moved for partial summary judgment which this Court denied on February 17, 1994. Defendant now seeks summary judgment in its favor.

Defendant argues that the "uncontradicted factual record in this case conclusively demonstrates that Plaintiff has sustained no damages as the result of any action

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[5] The Eleventh Circuit's holding was based on an appeal in a separate case that was decided after this Court's ruling but before consideration of the appeal in this case.

on the part of Monroe County"; therefore Monroe County contends that it is entitled to judgment as a matter of law. (Defendant's Motion for Summary Judgment, D.E. # 321, p. 1). Alternatively, if the Court finds a genuine issue of material fact to exist, Monroe County requests that the Court enter summary judgment limiting Plaintiff's claim for damages to the two month period from July 14, 1982, the expiration of the lease, to September 9, 1982, the date Plaintiff's sold the property.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only where it is shown that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. In ruling on the moving party's motion, the court must view the evidence in the light most favorable to the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Initially, the moving party bears the burden of pointing to that part of the record which shows the absence of a genuine issue of material fact. If the movant meets its burden, the burden then shifts to the non-moving party to establish that a genuine dispute of material fact exists. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir.1993), *reh'g denied*, 16 F.3d 1233 (11th Cir.1994). To meet this burden, the non-moving party must go beyond the pleadings. If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the Court should refuse to grant summary judgment. *Id.*

III. DISCUSSION

A. Plaintiff's ownership interest in the property:

Before addressing the merits of Defendant's summary judgment arguments, the Court must first determine the temporal period of Plaintiff's ownership interest in the breakwater property. It is undisputed that only one with an ownership interest in the property at the time a taking occurred is entitled to receive compensation. It follows that the owner may be compensated only for the damages the accrued during the period of its ownership interest. Thus, a determination of the extent of Plaintiff's ownership interest in the property is crucial to the determination of what damages may be proved and over what period of time.

To decide this question, the Court must determine whether or not the transfer of the breakwater property to TFW and the Land Trust on September 9, 1982 constituted a "sale" by which Plaintiff relinquished all ownership interest in the property. Plaintiff claims that the 1982 "sale" was not an arm's length transaction but rather a transfer between the two principals of the plaintiff company. Charles Netter and Stuart Marr were the two sole principals of New Port Largo, Inc. According to Plaintiff, the 1982 transaction merely transferred thirteen lots to Charles Netter, in the name of a corporation (TFW, Inc.), and thirteen lots to Stuart Marr, in the name of a trust ("Marr Land Trust"). Since the two principals of the plaintiff company remained the "beneficial owners" of the property after the transaction, Plaintiff urges this Court to find that it never released its interest in the

property and therefore is not barred from asserting damages after September 9, 1982.

The Court disagrees. Despite the fact that the principal owners remained the same, the transaction was held out to be at arms length and consideration was exchanged. Obviously, some benefit flowed to Marr and Netter from the transaction. To now essentially nullify the transaction would amount to this Court allowing parties to use legal formalities for the receipt of benefits without requiring them to accept the responsibilities and consequences that such legal formalities create. The Court will not legitimize such a distorted use of legal forms. The Court finds that the September 9, 1982 transfer was an arms length sale of the property that extinguished the ownership interests of Plaintiff. Therefore, Plaintiff's ownership interest extends from September 1, 1979, the date of purchase, to September 9, 1982, the date of the sale to TFW and the Land Trust.

B. Summary Judgment on the issue of causation:

Turning now to the substance of summary judgment motion before the Court, the Court notes that it previously reserved the issue of liability for trial. In the Court's Order Denying Plaintiff's Motion for Partial Summary Judgment, the Court found that factual disputes exist regarding the County's purpose for the rezoning and Plaintiff's expectations and reliance at the time it purchased the property. These are genuine issues of material fact that preclude summary judgment on the issue of liability. Although Defendant takes the position that no "taking" occurred when the County rezoned the disputed

property PA, for purposes of the summary judgment motion before the Court, Defendant argues that even assuming Defendant's liability, Defendant is entitled to summary judgment because Plaintiff cannot prove causation.

Essentially, Defendant takes the position that it was the airport lease on the property, not the County's rezoning of the property, that prevented Plaintiff from developing the land because even if the County had not rezoned the property, the lease would still have precluded any residential development on the property. Therefore, Defendant contends, Plaintiff cannot prove causation prior to the expiration of the lease. Defendant further argues that Plaintiff cannot show causation *after* the expiration of the lease and is, thus, entitled to no damages. Although the lease expired on July 14, 1982, it is undisputed that the tenant, the airport operator, refused to vacate the property and was not finally evicted until March 1985. In Defendant's view, during the period from July 14, 1982 – the date the lease expired – until September 9, 1982 – the date the property was sold – any damages that resulted were caused by the tenant's attempt to hold over rather than by the PA zoning. Finally, Defendant argues that Plaintiff cannot prove damages beyond the date it sold the property, September 9, 1982, since after that date Plaintiff no longer retained an interest in the property. Accordingly, Defendant asserts that Plaintiff can prove no damages for the entire period of the purported taking and therefore asks the Court to grant summary judgment in its favor.

In considering Defendant's motion, the Court will not decide the issue of liability. However, for purposes of

determining the appropriateness of summary judgment, the Court will assume that the purported taking occurred as of September 11, 1980, the date the County Commission denied Plaintiff's appeal of the rezoning.

1. During the term of the lease:

Viewing the evidence in the light most favorable to Plaintiff, as the Court must, the Court cannot find that as a matter of law Plaintiff can prove no damages during the period that the lease on the property remained in effect. While Defendant is correct in its assertion that even without the PA zoning on the property, Plaintiffs could not have developed the property during the term of the lease, it does not follow that, as a matter of law, the rezoning of the property caused no damages. What the zoning did, that the lease could not do, was to place what amounted to a "permanent" bar on the residential development of the property, thereby hindering the sale of the property for any use other than an airport. The lease, on the other hand, simply created a temporary restriction on the use of the land. It did not bar Plaintiff from subdividing the property and selling lots to be used for residential purposes in the future. But for the PA zoning, the property, theoretically, could have been used as residential property on the day that the lease expired. Therefore, theoretically, Plaintiff could have sold the property during the term of the lease for the purpose of residential development to begin after July 14, 1982. Once the County rezoned the property, however, the future ability to develop the property as residential was extinguished.

The Court recognizes that this theory of damages is speculative and would not permit recovery on the theory alone. In order for Plaintiff to avoid summary judgment it must establish a material issue of fact as to causation. To do so, Plaintiff must provide some factual evidence tending to show that, but for the rezoning, it would have sold some of the property. In other words, Plaintiff must offer some evidence that the rezoning, not the lease, prevented the sale of the property during the pendency of the lease. Evidence of at least one buyer who was willing to purchase the property subject to the lease but was not willing to buy the property subject to the PA zoning would be sufficient to defeat summary judgment.

Plaintiff has filed five contracts for the sale of lots that were entered into but never closed. The first contract, known as the Fernandez contract, was signed prior to the expiration of the lease and was conditioned on the settlement of the suit between Plaintiff and Defendant. However, since the contract was for the sale of lots not included in the rezoned area in dispute, the contract has no bearing on the issue of causation.[6] The second and third contracts name Angel and Rosa de la Torre as the buyers. Although these contracts are for the sale of lots contained in the airport breakwater, Plaintiff is not the seller. At the time that these contract were entered, Plaintiff had already sold the property to TFW and the Land Trust.[7] Indeed, both contracts plainly state that TFW, not

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[6] The Fernandez contract was for the sale of lot 439. The breakwater property included only lots 535 through 560.

[7] The first contract is dated September 21, 1982, twelve days after Plaintiff sold the property to TFW and the Land Trust.

Plaintiff, was the designated seller. While these contracts may be evidence that *TFW* lost opportunities to sell individual lots due to the PA zoning, it is not evidence that *Plaintiff* suffered any damage, as Plaintiff had already sold the property by the time these contracts were entered.[8]

The fourth contract, the Hinds contract, is similarly flawed. Although Plaintiff is the named seller on the face of the contract,[9] the agreement was not executed until September 28, 1982, over two weeks after Plaintiff sold the entire property to TFW and the Land Trust.

The fifth contract is the only one providing evidence that Plaintiff could have sold the disputed property subject to lease if the property had not been rezoned PA. The contract was executed of August 28, 1982, prior to the sale of the property to TFW and the Land Trust; Plaintiff is the named seller; and the contract specifies that the sale is subject to the lot being rezoned residential. Although this contract was never actually signed by Plaintiff, it is sufficient that it was executed by the *buyer* for purposes of showing that there existed a buyer willing to purchase the property during the pendency of the lease, but for the

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The second contract is not dated but it specifically names TFW as the seller. Therefore, it is reasonable to assume that this contract was drafted after the September 8, 1982 sale.

[8] TFW and the Land Trust are not parties to this suit. Nevertheless, it is doubtful that any of them could claim damages from Monroe County since the rezoning did not occur during their ownership and they purchased the property with knowledge of the PA zoning.

[9] Specifically, the contract designates "New Port Largo, Inc., its successors or assigns" as the seller.

PA zoning. This is not to say that this single contract would form a sufficient basis for establishing damages. The Court will not address that issue at this point. The Court is merely holding that for purposes of meeting Plaintiff's burden of proof to preclude summary judgment, the contract is sufficient to establish that a genuine issue of material fact exists regarding whether or not Plaintiff could have sold the property subject to the lease but for the rezoning. Therefore, summary judgment will be denied.

2. After the expiration of the lease:

Having found a material issue of fact to exist it is not necessary to determine whether damages can be shown for the period following the expiration of the lease. The Court merely notes, that as previously discussed, Plaintiff can establish no damages beyond the date it sold the entire property and relinquished its interest therein. And, as discussed below, the Fry contract creates a genuine issue of fact regarding the damages provable during the period after the expiration of the lease but prior to the sale of the property.

B. Summary Judgment on the period of liability:

The fact that Plaintiff has provided evidence of at least one buyer who would have purchased the property subject to the lease but for the rezoning is also sufficient to defeat Defendant's alternative request for summary judgment limiting the period of liability. Defendant argues that at the most liability should be confined to the

two month period of time between July 14, 1982, the date the lease expired, and September 9, 1982, the date Plaintiff sold the property. This argument is premised on Defendant's belief that no damages can be shown during the period of time in which the lease was effective. The Court has already rejected that argument. Once the rezoning occurred, assuming that it is later found to constitute a taking, Defendant's liability began to run. The simultaneous existence of the lease does not prevent Plaintiff from establishing damages caused by the rezoning.

This finding implicitly rejects Defendant's additional argument that any damages accruing to Plaintiff after the lease expired were caused by the tenant's attempt to hold over on the lease, not by the PA zoning. As this Court previously stated, the existence of at least one willing buyer is sufficient evidence to raise a genuine issue of material fact as to whether Plaintiff could have sold the property while the lease was operative. Assuming that Plaintiff could have sold the property while the lease was in effect, it follows that it could also have sold the property after the lease expired but while the tenant remained illegally thereon. Thus, the Court cannot find, as a matter of law, that any damage caused after the lease expired and prior to Plaintiff's sale of the property was caused by the tenant rather than the zoning.

Plaintiff has raised an genuine issue of material fact regarding the effect that the rezoning had on the salability of the property. If it is found at trial that the rezoning constituted a "taking", the period of liability would thus run from the date of rezoning – September 11, 1980 – to the date of sale – September 9, 1982.

IV. CONCLUSION

As discussed above, the Court cannot find, as a matter of law, that Plaintiff can prove no damages resulting from the County's rezoning of the breakwater property; therefore the Court must deny summary judgment. If, at trial, it is determined that the rezoning did constitute a taking, the period of liability will begin running on the date of rezoning (September 11, 1980) and terminate on the date Plaintiff sold the property (September 9, 1982). While the simultaneous existence of the lease with the PA zoning will not limit the liability period, the Court notes that it may affect the amount of damages that Plaintiff can prove. That question however is reserved for trial.

Thus, the issues remaining, to be determined at trial, are:

> (1) whether the County's rezoning of the property to PA constituted a taking, and
>
> (2) if so, the extent of monetary damages incurred by Plaintiff, as a result of the PA zoning, during the period from September 11, 1980 to September 9, 1982.

For reasons stated herein, it is therefore

ORDERED and ADJUDGED that Defendant's Motion for Summary Judgment be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that the period of liability, if liability is found to exist, will run from September 11, 1980 to September 9, 1982.

DONE and ORDERED.

APPENDIX E

New Port Largo, Inc. v. Monroe County
Case No. 85-4142 (11th Cir. January 31, 1997)

Order Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4142

NEW PORT LARGO, INC., a Florida Corporation,

Plaintiff-Appellant,

CHARLES H. NETTER, ET AL.,

Plaintiffs,

versus

MONROE COUNTY, a political subdivision of the State of Florida, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Jan. 31, 1997)

Before EDMONDSON, Circuit Judges, FAY and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, New Port Largo, Inc., is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson

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* Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX F

New Port Largo, Inc. v. Monroe County
Case No. 85-4142 (11th Cir. January 31, 1997)

Order Denying Petition for Rehearing and Suggestion of Rehearing En Banc

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4142

NEW PORT LARGO, INC., a Florida Corporation,

Plaintiff-Appellant,

CHARLES H. NETTER, ET AL.,

Plaintiffs,

versus

MONROE COUNTY, a political subdivision of the State of Florida, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Jan. 31, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___F.2d___).

Before: EDMONDSON, Circuit Judge, FAY and GIBSON*, Senior Circuit Judges.

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

APPENDIX G

New Port Largo, Inc. v. Monroe County
Case No. 87-10043-CIV-KING
(S.D. Fla. January 3, 1995)

Final Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-10043-CIV-KING

NEW PORT LARGO, INC.,

Plaintiff,

vs.

MONROE COUNTY,

Defendant.

_____/

JUDGMENT

(Filed Jan. 3, 1995)

This action came on for trial before the Court, Honorable James Lawrence King, Senior District Judge, presiding and the issue of liability having been duly tried and a decision having been duly rendered on December 20, 1994.

It is ORDERED and ADJUDGED that Plaintiff take nothing, that the action be DISMISSED on the merits and that Defendant recover of the Plaintiff its costs of action.

Dated at Miami, Florida, this 3rd day of January, 1995.

/s/ Vicki J. Kramerman
CLERK OF COURT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

cc: Jeffrey B. Crockett, Esq.
Michael R. Seward, Esq.
Alan G. Greer, Esq.
James Hendrick, Esq.
Randy Ludacer, Esq.

APPENDIX H

New Port Largo, Inc. v. Don Schlosser, et al.
Case No. 80-1164-CA-17
(Cir. Ct., Monroe Cty. January 2, 1986)

Final Summary Judgment

IN THE CIRCUIT COURT OF
THE SIXTEENTH JUDICIAL
CIRCUIT IN AND FOR
MONROE COUNTY, FLORIDA

CASE NO. 80-1164-CA-17

NEW PORT LARGO, INC.
a Florida Corporation,

Plaintiff,

vs.

DON SCHLOSSER, CURTIS BLAIR
GERALD HERNANDEZ, JR., RICHARD
KERR, and GEROGE DOLEZAL as
the Board of Commissioners of
Monroe County, Florida, and
MONROE COUNTY, FLORIDA, a
political subdivision of the
State of Florida,

Defendants.

FINAL SUMMARY JUDGMENT

(Filed Jan. 2, 1986)

This cause came on to be heard on the Motion for Summary Judgment of plaintiff, and the court hearing considered the argument of counsel for the respective parties and the evidence of record, finds as follows:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. The subject property comprisies more than five acres and the rezoning application is therefore a major development and subject to the procedures of the Major Development Project Ordinance (Chapter 6, Article VII, Monroe County Ordinances).

3. Ordinance No. 14-1979, enacted by defendant, Monroe County, on June 5, 1979, establishes a zoning district classification of private airport defining same in accordance with the definition of private airport in Chapter 333.01, Florida Administrative Code. The only permitted use in said zoning district is a private airport.

4. The airport located on the subject property, operated by a lesse, was a public airport. The subject property does not qualify by dimensions to meet the requirements as a public airport or a private airport.

5. Monroe County did not comply with the requirements of the Major Development Project Ordinance in the rezoning.

6. During the year 1982 Monroe County filed suit to establish ownership of the subject property, Case No. 82-432-CA-17, Monroe County Circuit Court. In 1984, the Circuit Court denied the claim of the County, declaring the property to be owned by plaintiff. the decision was affirmed in *Monroe County v. New Port Largo, Inc.*, 467 So. 2d 757 (Fla. 3d DCA 1985). This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use. However, the Court finds that the county attempted the rezoning in good faith inasmuch as it had an arguable claim at the time of filing the application for rezoning.

Therefore, it is Ordered and adjudged as follows:

A. The attempted rezoning of the subject property to Private Airport is invalid and Resolution No. 234-1980 is hereby quashed and said resolution is declared to be of no force and effect.

B. That final summary judgment is hereby entered in favor of plaintiff.

C. Costs of this action shall be taxed at a subsequent hearing.

DONE AND ORDERED in Chambers, Monroe County Courthouse, Key West, Florida, this 2nd day of January, 1986.

/s/ M. Ignatius Lester
Circuit Judge

Conformed Copies Furnished To:

JOSEPH B. ALLEN, III, ESQ.
LUCIAN C. PROBY, Jr., ESQ.

COPIES OF THE ABOVE Final Summary Judgment WERE HANDED OR

MAILED TO ATTORNEYS OF RECORD
ON 1/2/86

BY /s/ E. Gato

APPENDIX I

Monroe County v. New Port Largo, Inc.
Case No. 82-432-CA-17
(Cir. Ct., Monroe Cty. March 27, 1984)

Findings of Fact, Conclusions of Law
and Final Judgment

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY, CIVIL ACTION

MONROE COUNTY, a political subdivision, State of Florida, Plaintiff, vs. NEW PORT LARGO, INC., a Florida corporation, Defendant,	CASE NO. 82-432-CA-17 FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

THIS COURT, after having heard the evidence and considered the weight to be given the testimony of each witness in the light of their demeanor while testifying, their frankness of lack thereof, their interest in the outcome of the case if any, their means and opportunity to know the facts about which they testified, the reasonableness of their testimony in light of all of the evidence in the case, and considering the Citations of authority and argument of counsel for the parties, makes the following findings of fact, conclusions of law and enters the following Final Judgment:

I. FINDINGS OF FACT.

1. In 1960, Darryle Sheley ("Sheley") acquired certain property referred to as the Port Largo Subdivision ("Subdivision") as trustee for Mr. and Mrs. Stuart Faber ("Faber").

2. In the early 1960s, Sheley began developing the Subdivision.

3. In the course of said development, he dug two canals which provided deep-water access to the Subdivision.

4. Sheley allowed the Monroe County ("County") mosquito control planes to use a portion of his land in the Subdivision, that had been cleared but not yet developed as an air-strip.

5. As the Subdivision developed with houses and electric and phone equipment, the airplanes could not use the Subdivision as an airstrip.

6. in 1967, Sheley and his friend, County Commissioner Harry Harris ("Harris"), began to discuss the possibility of acquiring certain submerged property adjacent to the Subdivision (the "Property") from the Trustees of the Internal Improvement Fund ("Trustees") to construct an airstrip so that the Monroe County ("County") mosquito control planes could have an Upper Keys landing site.

7. Sheley and Harris tentatively agreed that if Sheley, the abutting upland owner of the "Property", acquired the Property he would at some future date donate it to the County in consideration for the County's construction of a breakwater and north-south canal for the Subdivision. The breakwater and canal were to be built on some submerged land owned by Sheley and the "Property" to be obtained from the "Trustees".

8. In accordance with this plan, Sheley, through Jim Glass ("Glass") who also served as Monroe County Engineer, applied to the Trustees for title to the Property.

9. Jim Glass had no authority to encumber or convey the Property on behalf of Sheley.

10. After several delays by the "Trustees", and several revisions of the application, including revision of the bulkhead line so that it would not extend beyond the rights of the adjacent property owners and revising the price per acre from $300.00 to $414.15. The Trustees sold the "Property" to Sheley by Deed which contained no restrictions or reservations as to the Properties use.

11. The County learned through its consultant, that it could not obtain funds for the breakwater and canal, and the County abandoned the plan.

12. The County communicated its abandonment of the plan to Sheley, through Harold Wilde ("Wilde"), its airport consultant.

13. Sheley, under his plan with the County, intended to construct a 100-foot-wide airstrip; however, after the County abandoned the plan, Sheley spent more than $400,000.00 to construct a 150-foot-wide breakwater, which included a row of residential lots and a street.

14. Sheley paved the street which has become used as the landing strip.

15. In 1970, Sheley's trust expired and Kenneth Bassett ("Bassett") became trustee.

16. Sheley continued to develop and manage the Property under a power of attorney from Bassett.

17. In 1972, the County, pursuant to Sheley's request, platted the Property into residential lots and zoned the Property for residential duplexes.

18. Also in connection with the platting, the County accepted Sheley's deed to certain lost which they now claim, as a bond to assure completion of Subdivision improvements.

19. Upon completion of the Subdivision improvements, the County returned the deed to the lots to Sheley without making any demands for dedication of the Property to the County as an airstrip.

20. The County has collected taxes and levied solid waste assessments on the Property as residential lots and not as an airstrip.

21. New Port Largo, Inc., a Florida corporation ("New Port Largo"), acquired the Property from Bassett in September, 1979.

22. Although Charles Netter ("Netter"), an attorney, one of the principals of New Port Largo, was advised that the County had a claim against the Property, he checked the title to the Property, including the abstract, the Trustees deed, the platting, the taxes and assessments and the zoning and determined that title was vested in Bassett.

23. Stuart Marr ("Marr"), who is now the other principal of New Port Largo, acquired an interest in the corporation some time after the original contract for purchase of the Property and before the closing.

24. Marr had, more than a year prior to becoming a principal in New Port Largo, been involved as the

broker on behalf of Mr. and Mrs. Joseph L. Sharit in the sale of their Subdivision lot to Mr. and Mrs. Gerald Recob.

25. During the course of that closing, Marr had heard about the County's claim; however, he had not studied Sharit's documents and did not know of the substance or details of the claim.

26. New Port Largo paid valuable consideration, to-wit, more than Two Million Dollars ($2,000,000.00) for the Property.

II. CONCLUSION OF LAW

1. The County has failed to establish an express trust for the Property.

2. As with any contract, for a promise to donate land in the future to be binding, there must be some legal consideration passed. The Third DCA addressed this issue in *Kaufman v. Harder,* 354 So. 2d 109 (3d DCA, 1978). That case stands for the proposition that there can be no indebtedness without legal consideration; and that a mere gratuitous promise of a future gift, lacking consideration, is unenforceable as a nudum pactum.

The consideration needed to make such an agreement binding would be either some benefit to the promisor/landowner or a detriment to the promisee/county. In the case at bar, the landowner has received no benefit as a result of his alleged promise to the county, because he bought the land from a Third Party, the State, in a transaction that is separate from his alleged promise to the

county. Neither has there been a detriment to the promisee/county, because they have not paid any money or any other consideration in return for the alleged promise. Thus, applied to the *Kaufman* case, consideration is lacking, and the landowner's gratuitous promise can not be enforced.

Failure to carry out a promise cannot in itself give rise to a constructive trust. Consideration must be passed between the parties for such a trust to be found. *Leeper v. Gorman*, 128 So. 876, (Fla. 1930). As seems to be established by the facts of the present case, the landowner recieved no consideration in exchsnge for his alleged promise.

More recently, the 3rd DCA, in *Yawn v. Blackwell*, 343 So. 2d 906 (3rd DCA, 1977) found that for a constructive trust to be imposed there must exist a situation between parties involving fraud, undue influence, abuse of confidence or mistake. To enforce a constructive trust in the case at bar, under the requisites of *Yawn*, the Court would have to find that a fraudulent representation by the landowner to the County was the actual cause of the State's sale of the land to said landowner. Such does not appear to be the case, as the sale by the State was not conditioned by any such future donation of the land to the County.

When weighing the evidence of the existence of consideration, or of any fraud or mistake to prove constructive trusts, the standard as set by the 3rd DCA is that of "clear and convincing" evidence. *Hiestand v. Geier*, 396 So. 2d 744 (3DCA, 1981).

3. The County has failed to establish fraud, breach of fiduciary duty or any other inequity by Sheley or his successors.

4. The County has failed to prove that any enforceable contract to convey the Property existed between Sheley and the County for the Property.

5. The County has failed to establish the basis for imposition of a constructive trust.

6. Even if the County had produced clear and convincing evidence sufficient to establish a constructive trust, and it has not, the County, by platting, accepting and returning deeds, taxing and assessing the Property is equitably estopped to claim the Property from New Port Largo.

7. The County, which is a political subdivision of the State of Florida, is legally estopped to claim any right in the Property or any limitation on the use of the Property because it is bound by the unrestricted deed from the Trustees to Sheley.

8. The County, which delayed almost 14 years to assert a claim to the Property, is barred from relief under the doctrine of laches.

9. New Port Largo is a bona fide purchaser for value of the Property.

10. Since the rights of an innocent third party bona fide purchaser for value have intervened, the County cannot divest New Port Largo of title to the Property.

IT IS THEREUPON ORDERED AND ADJUDGED AS FOLLOWS:

1. The final judgment is in favor of Defendant, NEW PORT LARGO, INC., and against Plaintiff, MONROE COUNTY, a political subdivision of the State of Florida.

2. The County shall take nothing by this action and shall go forth hence without day.

3. The Court reserves jurisdiction to tax costs on behalf of New Port Largo and against Monroe County.

DONE AND ORDERED in Chambers, at Monroe County, State of Florida this 27day of March, 1984.

/s/ Francis X. Knuck
FRANCIS X. KNUCK,
Circuit Judge

Copies to:

Walter S. Kyle, Esq.
Lucien C. Proby, Jr., Esq.
Joseph B. Allen, III, Esq.
Charles Netter, Esq.
Joe Creely, Esq.
Joe Sharit, Jr., Esq.
Mallory H. Horton, Esq.
Marsha G. Rydberg, Esq.

Supreme Court, U.S.
FILED
MAY 30 1997
CLERK

No. 96-1752

In The

Supreme Court of the United States

October Term, 1996

NEW PORT LARGO, INC.,

Petitioner,

vs.

MONROE COUNTY, FLORIDA,

Respondent.

On A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

ALAN G. GREER*
M. MARGARET HALEY, AND
LAWRENCE H. KUNIN
RICHMAN GREER WEIL BRUMBAUGH
MIRABITO & CHRISTENSEN, P.A.
201 South Biscayne Boulevard
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Monroe County, Florida, respectfully requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Eleventh Circuit. The court of appeals' opinion is reported at 95 F.3d 1084 (11th Cir. 1996). (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition.)

ORDINANCE

Monroe County, Fla. *Code* § 19-196 (1987) (Set out in Appendix J)

STATEMENT OF THE CASE

I

THE FACTS

This case involves an inverse condemnation challenge due to a county zoning ordinance that changed the zoning of a parcel of land, the breakwater property. Because the land at issue had been reclaimed from the Atlantic Ocean, it had no zoning until 1972. In that year, it was zoned RU-2 residential because, at the time, Monroe County ("the County") had no zoning classification applicable to airports. While New Port Largo, Inc. ("NPL") indicates that the land in question had been zoned for "residential use," it fails to mention the fact that the original owners requested a zoning change to allow for

use of the breakwater as an airstrip. And while that rezoning did not occur, Monroe County granted a variance which achieved that same purpose. Moreover, NPL claims that rezoning the strip was "unprecedented," yet the parcel had operated as an airstrip with the zoning variance since the time the breakwater was created through a dredge-and-fill operation.

The development of Port Largo began in the 1960's (by parties other than NPL). To protect the land from storm surges, the developers applied to the State of Florida (as owner of all submerged coastal land in the state) for the purchase of 9.65 acres of submerged state-owned land located adjacent to the subdivision's mainland homesites. R13-248-41 to 42. The submerged land in question ran parallel to the coast and, once filled, created an "arm" extending down the coast, as a buffer between the subdivision and the open ocean. *See* Map at B-32.

The minutes of a meeting of the Florida Trustees of the Internal Improvement Trust Fund held on December 19, 1967, reflect that the developers represented to the Trustees that they needed the state-owned land

> for construction of a breakwater *to be used as a landing strip for small planes,* which would serve three public purposes. First, about 150 property owners' land would be protected by the breakwater; second, Monroe County Commission desired that the landing strip be constructed because it would be deeded to the county; and third, the airstrip would aid the Monroe County Anti-Mosquito District in its spraying operations.

R13-248-34 (emphasis added).

In their application for purchase to the Trustees, the developers also stated that "[t]he breakwater and runway will eventually be donated to Monroe County and be operated as a public facility." R13-248-42. This promise was the basis for a lawsuit to quiet title which the County brought years later.

The Port Largo Airport

Consistent with the intention expressed above, a runway was added to the breakwater property shortly after it was created and the Port Largo Airport was licensed for business by the State of Florida Department of Transportation as a "public airport" in January 1974. R14-280-21. It was in continuous operation, and continuously licensed by Florida as an airport, from that date until on or about February 28, 1985. R11-205-132 to 133; R14-280-22 to 36.

A "public airport" is defined by Florida statute as "an airport, publicly or *privately owned*, which meets minimum safety and service standards and is open for use by the public." Fla. Stat. § 330.27(11) (emphasis added). An airport license is valid for one year, Fla. Stat. § 330.30(2)(e)(1), although it may be revoked at any time if the Department of Transportation determines that "the airport has become either unsafe or unusable for the aeronautical purposes for which the license or renewal was issued." Fla. Stat. § 330.30(2)(f)(3) (emphasis added).

Despite NPL's claims that it was not possible to operate a safe airport on the breakwater lot because of its design, the Port Largo Airport was inspected by the Florida Department of Transportation for safety during

each year of its existence and was found to meet all applicable safety standards. Copies of the public records proving this fact was submitted to the district court. R14-280-22 to 36.

In 1977, the original developers of the Port Largo subdivision entered into a five-year lease with an airport operator to run an airport on the breakwater property. R11-205-25 to 27. After the lease had expired, the operator held over; NPL, as the new owner, instituted an eviction proceeding against the airport operator who vacated the property shortly after February 28, 1985. R11-205-130 to 133.

NPL incorrectly states as "fact" that the County rezoned the land "for the express purposes of ensuring that the existing airstrip remained open for the *public's* use and to prevent the property's residential development by NPL." [Pet. Brief at 4] Actually, the plain language of the ordinance states that "[t]he PA district is intended to provide a classification of property where the *private* airport *may* be established." [J-1 (emphasis added)]

The ordinance was expressly applicable "to all presently existing private airports in Monroe County. . . . " *See* J-1. The breakwater airstrip was one such private airport. This ordinance was passed three months *before* NPL purchased the property in question. R-11-205-60 to 64.

After a full hearing, the zoning of the property was changed by the Zoning Board of Monroe County from RU-2 residential to PA-Private Airport in June, 1979, to conform to the property's historical use, and the decision

of the Zoning Board was upheld by the Board of County Commissioners on appeal.

The original developer sold its overall development of more than 60 acres to NPL on September 1, 1979. Part of this land NPL purchased was the 9.65 acres of breakwater property leased and in use as the Port Largo Airport (the breakwater had been platted into twenty-five separate lots). R11-205-54. Thus, NPL purchased the property subject to the new ordinance and subject to an existing five-year lease to a contractor who was running an airport on the property.

NPL filed suit in Florida Circuit Court on October 10, 1980, seeking to overturn the decisions of the Zoning Board and the Board of County Commissioners. In its Petition, NPL alleged that "[t]he application for rezoning and decisions of the Board [of Zoning] and Commission were defective, invalid and failed to conform to law in that the application was not processed as a major development project as required by Article XIV of the Monroe County Zoning Ordinance and the Major Development Project Ordinance." R13-248-24. NPL did not present evidence in the state court proceedings that the breakwater property had been "taken" as a result of the change in zoning. In other words, the relief NPL sought was invalidation of the zoning; it did not bring an action for a "taking." Specifically, in state court counsel for NPL charged that the rezoning of the airport was defective because it had failed to conform to a variety of technical requirements set forth in the County's Major Development Project Ordinance (MDPO) even though the MDPO was intended to apply only to proposed, and not existing, development projects. The state court entered summary judgment in NPL's favor, invalidating the airport zoning

of the breakwater property, on January 2, 1986. R13-248-75 to 76. The court did specifically find, however, "that the county attempted the zoning in good faith. . . ." R13-248-75 to 76.

This Florida state court was *never* informed of the fact that NPL had divested itself of all right, title and interest to the property in question on September 9, 1982, three years earlier. The case proceeded to final judgment on January 2, 1986, under the mistaken assumption that NPL continued to own the airport breakwater property.

In similar fashion, the Florida state court that was handling the County's quiet title and constructive trust litigation at the time was also never advised that NPL no longer owned the property in question. Final Judgment was entered in NPL's favor and the case was affirmed on appeal on the mistaken belief that NPL was the appropriate defendant. *See Monroe County v. New Port Largo, Inc.*, 467 So. 2d 757 (Fla. 3d DCA 1985).

At a time when NPL no longer had *any* interest in the airport breakwater property, NPL filed its Complaint in this case, alleging that the airport breakwater property was temporarily "taken" by Monroe County in derogation of NPL's constitutional rights. R1-1. NPL also falsely alleged that it was *the current owner* of the airport breakwater property. R1-1. The real owners of all "right, title and interest" in the airport breakwater lots have never participated in this litigation.

II

THE COURSE OF PROCEEDINGS

As will be explained in greater detail later, NPL mischaracterized the holdings of the district and appellate courts in stating that they held "that the rezoning of homesites to a public-use airport for the public's benefit was not a taking." [Pet. Brief at 8] Neither court deemed the rezoning to be for a "public-use airport"; the rezoning was to permit "PRIVATE AIRPORTS" in conformity with how the property was always used.

REASONS FOR DENYING THE WRIT

I

NO CONFLICT EXISTS REGARDING THE JURY TRIAL ISSUE

This Court need not grant certiorari as *New Port Largo, Inc. v. Monroe County,* (*NPL II*) does not present a conflict among the circuits, nor does conflict exist with any decision of this Court regarding whether certain questions must be resolved by a court or by a jury in inverse condemnation proceedings.

Regarding the substantive due process claims, the Eleventh Circuit in *NPL II* followed its prior decision in *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1578 (11th Cir. 1989), in holding that an "ultimate issue," such as "whether a zoning decision is arbitrary and capricious[,] is a question of law to be determined by the court." In reaching that holding, the Eleventh Circuit cited this Court's language in *Village of Euclid, Ohio v.*

Ambler Realty Co., 272 U.S. 365 (1926), to demonstrate that the issue is a legal question: to wit "weighing whether 'the reasons are sufficiently cogent to preclude *us* [i.e., this Court] from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable.' " *Greenbriar*, 881 F.2d at 1581, n. 15 (quoting and adding emphasis to *Village of Euclid*).

As the Eleventh Circuit explained in its opinion below (and in *Greenbriar*), a jury should make any "subsidiary" fact findings, but no such "subsidiary facts" needed resolution in the present case "because there were no material facts in contention below" on the substantive due process challenge to the zoning laws – i.e., "whether the action of the zoning commission [was] arbitrary and capricious. . . . " *NPL II* at A-15.

In any event, in the takings context, NPL's original representation to the trial court must be held to constitute a waiver of the jury trial issue. The Eleventh Circuit noted at footnote 9 of *NPL II* that NPL originally represented to the court that *only* the damages issue was for the jury and that the district court was to decide all other issues relating to taking.

NPL's position before the district court was as follows:

> MR. CROCKETT: Counsel is correct that the issues relating to taking other than damages are for the Court. The damages issue is for the jury.

R31-507-7 to 8.

At one time, therefore, Monroe County and the district court were under the clear impression that there was agreement between the parties on the fact that the liability aspects of this case were to be tried before the district court alone. NPL then changed its mind. Immediately before the trial, in fact, it filed an Emergency Petition for Writ of Mandamus with the Eleventh Circuit, contesting the district court's decision to preside over the liability aspects of this case and raising the same arguments on this subject that it makes here. Its petition was denied by the Eleventh Circuit.

What NPL is really complaining about is that the district court did not empanel a jury to hear the case *at the same time* the court was hearing the facts and arguments it alone could rule on concerning whether a temporary "taking" had occurred without due process of law. The district court preserved NPL's jury rights, however, by ruling that it would empanel a jury if and when the court found that NPL's land had been "taken" as a matter of law.

The Eleventh Circuit ruled in accordance with its precedent. With regard to the elements of a due process claim,

> [t]he test in this Circuit as to whether there has been a violation of due process in the context of section 1983 has two prongs. First, *the court* must determine whether there has been a deprivation of a constitutionally protected interest. Second, *the court* must determine whether the deprivation was the result of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation. . . . In the

> zoning context, the issue is whether the Board's action bore any substantial relation to the public welfare.

Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991) (citation omitted; emphases added).

NPL maintained that it satisfied the first prong of this due process test by proving that the constitutionally protected interest that it had been deprived of was its right not to have its property taken without the payment of just compensation. That is, however, precisely the question that only a court can adjudicate. The multiple elements of the second prong are also issues for resolution by a court alone. "Where substantive due process violations have been alleged in other contexts, this court has made it clear that it is for the judge to decide whether governmental actions so offend standards of decency and fairness as to implicate constitutional protections." *Greenbriar*, 881 F.2d at 1578 n.15.

Thus, all of the claims presented by NPL hinged upon a single issue of pure law: Did the re-zoning of the airport breakwater unconstitutionally deprive NPL of its property without just compensation? It is clear that that question can and must be answered by a trial court sitting as the trier of fact. When that question was answered in the negative, then all of NPL's due process claims fell by the wayside. NPL could not demonstrate that its substantive due process rights were violated if the breakwater property was not "taken."

Moreover, by allowing a court to first determine whether a taking has occurred, principles of judicial economy are promoted. If no taking has occurred, then

the need for a jury determination regarding damages is moot. By bifurcating the question of law from the damages question, NPL was not deprived of a jury trial; the judge merely narrowed the issues as he had the discretion to do.

Moreover, no intra-circuit conflict exists, nor does the Eleventh Circuit's decision conflict with any decision of this Court. Contrary to NPL's reading of the case, the holding in *NPL II* can easily be harmonized with the decision of the Ninth Circuit in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *motion for reh'g pending*.[1] In *Del Monte*, the trial court submitted the takings issue to the jury. Not pleased with the jury's verdict, the City of Monterey argued that the court should have made the takings determination itself. The Ninth Circuit only held that the court did not err by submitting the issue to the jury because, under the unique facts of that case, it presented a mixed question of law and fact which made it permissible to submit the matter to the jury for resolution. Nowhere does the opinion state that the takings issue *had to be* decided by the jury or that the judge would have erred had it not submitted the question to the jury. In fact, the opinion explains how the judge's decision whether or not to send the question to the jury was essentially discretionary under the circumstances.

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[1] The Ninth Circuit opinion is not final. Well prior to the filing of NPL's Petition for Writ of Certiorari, that court issued an order requiring Del Monte Dunes to respond to the City of Monterey's Motion for Rehearing which was grounded in part on the *NPL II* decision. *See* Appendix K. Del Monte Dunes has responded, but the court has not yet issued a ruling.

The district court in *Del Monte* determined that the substantive due process claim presented only legal issues and resolved that matter *without* the aid of a jury, but sent the equal protection and takings questions to the jury. 95 F.3d at 1424. The *Del Monte* court acknowledged that the "inquiries present[ed] mixed questions of law and fact, which *may* be submitted to the jury if they are essentially factual, even if they implicate constitutional rights." 95 F.3d at 1428 (emphasis added). Finding that the inquiries presented a "mixed question of fact and law," the *Del Monte* court held *only* that "the district court *did not err* by submitting it to the jury." *Id.* at 1429 (emphasis added).

The *Del Monte* court also recognized that sending to the jury the question of whether the City's regulation advanced a legitimate public purpose or having the judge decide it is a "close" question. *Id.* at 1430. Finding that while a reasonableness inquiry is "often" a jury issue because it is "essentially factual," it is nevertheless a *mixed* question of fact and law, and as such, "it is the type of question that *can* be put to a jury." *Id.* at 1430 (emphasis added). Thus, the *Del Monte* court came nowhere near saying that such an inquiry was *required* to be sent to the jury. Thus, no conflict exists.

Regardless of the interpretation of the *Del Monte* decision, this Court has itself resolved the takings question as a matter of law on many occasions. For example, in *Penn Central*, this Court itself determined the legal question of whether a taking occurred by assessing whether the restrictions permitted a reasonable, beneficial use of the property. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 137-38 (1978). The trial court's finding that there was a taking had been reversed by the

New York Supreme Court Appellate Division and was thereafter affirmed by the New York Court of Appeals and this Court. All of these reviewing courts were able to pass on this takings question *de novo*. Thus, it is a legal determination which can be decided by a court.

For example, the New York Court of Appeals was able to resolve the question of law by determining that the ordinance "had not transferred control of the property to the city, but only restricted [the owner's] exploitation of it."[2] 438 U.S. at 121. That is the same type of analysis the trial court performed in this case when it concluded that no temporary taking occurred because the ordinance permitted various uses of the property and did not deprive NPL of "all or substantially all" value.

There are many other examples of this Court determining the takings issue as a matter of law. In holding that no taking occurred in *Goldblatt v. Hempstead*, this Court decided for itself whether an ordinance prevented

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[2] This Court also determined that no "taking" existed under New York City's Landmarks Preservation Law (Landmarks Law) because:

> (1) the same use of the [Railroad] Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the [transferable] development rights above the Terminal . . . provided significant compensation for loss of rights above the Terminal itself.

485 U.S. at 104-05.

an owner's reasonable use of its property and whether the restriction served a substantial public purpose. *Penn Central*, 438 U.S. at 127 (citing *Goldblatt*, 369 U.S. 590 (1962)).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court assessed whether an exercise of land-use regulation power amounted to a taking and ultimately determined that conditioning a permit upon the owner's recordation of a deed restriction granting an easement for public beach access did not advance legitimate state interests and required compensation. Similarly, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court performed the takings analysis itself and held that certain zoning ordinances did not amount to a taking by ruling that the ordinances advanced a legitimate governmental interest and by assessing the fairness of the ordinance along with any diminution in market value and by evaluating the reasonable investment-backed expectations of the landowners. *Id. See also Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 495 (1987) (determining the takings issue as a matter of law, this Court decided that the "mere enactment" of a statute regulating the uses that can be made of property did not effect a taking when it applied the fairly straight-forward test of whether the regulation " 'denies an owner economically viable use of his land . . . ' " and found that the reduction-in-mining regulation had not materially affected the owner's investment expectations) (quoting *Agins*, 447 U.S. at 260).

Significantly, this Court in *Agins* did not address whether a state may limit the remedies available in an inverse condemnation action. It disposed of the case by ruling that no taking had occurred. *Id.* at 263. Similarly,

when Penn Central asked this Court to review whether the restrictions imposed on its property effected a taking and whether it was afforded "just compensation," this Court determined that the taking question was dispositive and thus did not reach the question of compensation. 438 U.S. at 122.

It was that concern for judicial economy that drove the District Court in the present case to perform a similar role; by first addressing the legal questions which could potentially dispose of the case, the judge eliminated the need to proceed with empaneling the jury on the compensation issue. This process is little different than a judge holding a hearing on a motion to dismiss for failure to state a claim or ruling on a motion for summary judgment. The court below merely assessed the takings issue as a matter of law, determining that the landowners had not been deprived of all economically viable use of the land, no physical invasion of the property occurred, and the land had not been converted to public use. As demonstrated above, courts have a history of making such findings as a matter of law. Thus, there is no conflict with the efficient method by which the trial judge resolved the legal question of whether or not a taking occurred.

It is relevant to note that NPL itself sought to have a legal determination of these issues by the appellate court; NPL argued in its Reply Brief in the Eleventh Circuit as follows: "NPL believes that its claims should be decided *as a matter of law* in its favor; however, to the extent that any genuine factual issues exist, they should be submitted to a jury." [Eleventh Cir. Reply Brief, p. 25 (emphasis added)]

Of course, such a determination as a matter of law is only acceptable to NPL if the decision is in its favor; otherwise, NPL believes that only a jury can resolve the takings question. But if there are circumstances under which a court can decide the issue "as a matter of law" for one party, then it can do so in favor of the other party under like circumstances – e.g., when the court is presented with a legal question.

There is no basis for granting the petition for writ of certiorari.

II

NPL'S PROPERTY WAS NEITHER CONVERTED TO PUBLIC USE, NOR PHYSICALLY INVADED; THEREFORE, THE LOWER COURTS CORRECTLY FOUND THAT NO "TEMPORARY TAKING" OCCURRED

NPL argues that this Court needs to further "address the circumstances in which a temporary deprivation of the right to use and control property requires 'just compensation' under the Fifth Amendment"; however, the *First English* decision provides sufficient guidance and need not be revisited merely due to the passage of time. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Neither does the holding of the Eleventh Circuit present, as NPL contends it does, "an attempt to undermine drastically the temporary takings analysis of *First English*." [Pet. Brief at 15-16] Merely because the lower courts were in agreement that there was no "temporary taking" *in this case* does not mean that those courts also found that no compensation can ever be due in a "temporary takings" case.

Part of the problem lies in NPL's mistaken perception that if there is *any* public purpose which underlies the enactment of a zoning ordinance, then the ordinance must run afoul of constitutional just compensation requirements. In fact, the almost uniform state of the law is that just because a public purpose is advanced by the enactment of a zoning ordinance does not mean that the Fifth Amendment has been violated.

To start, NPL has distorted the holding of the lower court by claiming that the court "held that private land can be commandeered for public use so long as the unwilling property owner is entitled to charge admission." [Pet. Brief at 16] Nothing could be more inaccurate. The Eleventh Circuit, in explaining the many alternative uses available to the property owner, did not state that the land could be converted to public use. NPL's portrayal of the court's decision on this point is nothing short of disingenuous.

Furthermore, in order to make its case sound plausible, NPL has inserted comments reflecting the opinions of various individuals, some of which the district court ruled were inadmissible; NPL pursued this same tactic on appeal to the Eleventh Circuit. Despite these comments to which NPL refers, the trial judge found that the property was not converted to pubic use because both the language of the ordinance and the testimony of the experts made it apparent that (1) the breakwater airstrip was for private use, unless the landowner chose otherwise, and (2) the breakwater lots could be used for many other purposes, none of which required NPL to provide public access.

NPL admits that the Court of Appeals held that NPL's property had not been taken "based on the district court's 'factual' finding that New Port Largo had not been denied all economically viable use [of the property]. . . . " [Pet. Brief at 19] Yet NPL complains that the Eleventh Circuit erred by not addressing the "character of the government action" as discussed in *Penn Central* and *Babbitt*. *Penn Central*, 438 U.S. 104 (1978); *Babbitt v. Youpee*, ___ U.S. ___, 117 S. Ct. 727 (1997). That is at best inaccurate. The Eleventh Circuit did in fact cite this factor and addressed it fully. [A-7]

The *NPL II* decision is not in conflict with either of these Supreme Court decisions. The *Babbitt* decision merely found that the typical two tests of legitimacy would not be as helpful in determining whether a taking occurred and that a third test, the character of the governmental action, would play a key role in the analysis. *Babbitt*, 117 S. Ct. at 731. *Babbitt* addressed restrictions imposed on the ability of Indian tribe members to pass on fractional interests in parcels or tracts of land. 117 S. Ct. at 731. The Court explained that the economic-impact factor "might fail to capture the actual economic value of the land," and that the investment-backed-expectations factor would not apply because of the nature of the interests affected by the statute. 117 S. Ct. at 731. Thus, the decision certainly did not eradicate these two factors simply because it found that the third factor would provide the greatest insight into whether a taking occurred under the unique facts of the case. The Court ultimately found that the " 'virtua[l] abrogation of the right to pass on a certain type of property' " was the government action which could not be upheld. *Id.* (citations omitted).

Penn Central, cited by NPL itself on this issue, explains that "the character of a governmental action" addresses whether the interference with property can be characterized as a "physical invasion" by government or "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. And even though the land-use regulation in *Penn Central* denied the landowners the ability to exploit a property interest (i.e., the "air rights" above the terminal), this Court explained that the character and impact of the law did not amount to a taking merely because its operation significantly diminished the value of the property. 438 U.S. at 131. Likewise, the landowners could not convince this Court that the character of the governmental action was discriminatory based on the argument that landmark preservation laws single out particular parcels for disparate treatment. *Id.* at 132.

The litany of cases cited on pages 19 to 20 of the Petitioner's Brief address the situation in which a government *physically invades* property or *requires public access* onto the property. Neither situation is present here, despite NPL's claim to the contrary. In fact, the Eleventh Circuit acknowledged that when " 'the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation. . . . ' " [A-7 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982) (citations and internal quotation marks omitted in original))] Taken in context, the Eleventh Circuit's comment that NPL could let the property sit completely empty was an observation made only to demonstrate the

fact that no physical invasion occurred, unlike in *Loretto* where the landowner "could not exclude the cables from his property, at any cost. . . . " [A-7] Similarly, the comments explaining that the property could remain "dormant" were made to highlight the fact that the County's ordinance did not *require* that the land be used as an airport – i.e., there was no conversion of the land for public use. The official regulation of a *permitted* use does not amount to a regulatory command that the landowner *must* devote his property to that use and no other. There simply was no "required acquiescence" mandated by the PA zoning.

Attempting to paint conflict where none exists, NPL distorts the Eleventh Circuit's treatment of *Nollan* and *Dolan*. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Nowhere in the court's discussion of these two cases does the Eleventh Circuit condone, as NPL claims, the dedication of private property to public use as long as the landowner is allowed to charge the public for access. [Pet. Brief at 20] The court clearly stated that the regulation "did nothing to require NPL to open its property to the public for use just as the public wished." [A-6] In fact, the court cited many profitable uses which would be permissible under the ordinance – none of which required public access: a private airport, boat slips, a beach club, or dry storage for boats. [A-9] The language of the ordinance itself is plain in its statement that the Private Airport classification was *permissive* in nature, rather than mandatory. The ordinance was simply "intended to provide a classification of property where the private airport *may* be established." [J-1 (emphasis added)] There was

nothing in the ordinance which purported to require the continuing operation of a private airport over the objections of the property owner. Instead, the ordinance was designed merely to regulate some of the uses of airport property so that flight operations could be conducted without interference and the safety of the general public could be safeguarded. Thus, in assessing the character of the governmental action, the Eleventh Circuit correctly held that there was *no physical invasion* of the property by the government, nor was there a dedication of any of the property to public use.

In reviewing the character of the additional governmental action complained of – i.e., NPL's conspiracy theory – the Eleventh Circuit found that this claim was not ripe because NPL never sought compensation for the County allegedly having received "rent" from NPL's airport tenant. Such a conspiracy theory, the court reasoned, does not have anything to do with whether the ordinance permitting the existence of a private airport amounted to a "taking." [A-8]

As no conflict exists, the petition for writ of certiorari should be denied.

III

BECAUSE THE STATE JUDGMENT HAD NO PRECLUSIVE VALUE, THE DISTRICT COURT DID NOT VIOLATE THE FULL-FAITH-AND-CREDIT CLAUSE

The district court and the Eleventh Circuit did not ignore the full-faith-and-credit clause.[3] To the contrary, they correctly assessed the preclusive effect of the state court judgment in light of the issues before that court and the district court. [A-9, 10] Importantly, the judge in the Florida state action merely invalidated the PA zoning because he was convinced Monroe County had failed to adhere to certain technical niceties in its enactment of the original zoning ordinance. The resolution of that issue by the state court had nothing to do with whether or not a "taking" occurred; thus, the district court was not bound by any dicta in the state court's final judgment.

In order to have had any preclusive effect in the federal court action, the earlier judgment must have met the following prerequisites:

> (1) the issue at stake must be *identical* to the one involved in the prior litigation; (2) the

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[3] *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 4423, n. 9.5 (Supp. 1994):

> "Issue preclusion is normally committed to the broad discretion of the district courts." Appellate courts review de novo the question of the "availability" of preclusion, which includes the requirements of identical issues actually and necessarily determined by a final and valid judgment. Whether there was a full and fair opportunity to litigate relates to the fairness of preclusion, a matter of "applicability" that is reviewed for abuse of discretion.

> issue must have been *actually litigated* in the prior suit; (3) the determination of the issue in the prior litigation must have been *a critical and necessary* part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a *full and fair opportunity to litigate the issue* in the earlier proceeding.

I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986) (citations omitted) (emphasis added).

None of these requirements was met in this case. The appellate court properly held that NPL failed to meet its burden[4] of proving that the comment in the final judgment stating that the property had been "taken" was "necessary and material" to the issue in that action. The state court had *no* need to comment on whether or not economically viable uses existed for the property; such a finding was not relevant to resolving the question of whether or not to quash the PA zoning ordinance as not having complied with the requirements of Monroe County's Major Development Project Ordinance.

The questions of whether NPL's property had been "taken" as a result of the re-zoning was *not litigated* in the state proceedings.[5] Neither NPL nor Monroe County ever

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[4] *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 98-99 (Fla. 1973) ("the burden of establishing the certainty of the matter formerly adjudicated is on the party claiming the benefit of it").

[5] *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 4416 (Supp. 1994) ("As compared to claim preclusion, the rules of issue preclusion do not purport to prohibit litigation of matters that never have been argued or decided").

even attempted to address any Fifth Amendment or § 1983 claims in state court. A finding to the effect that the airport breakwater had been "taken" by Monroe County was not a critical and necessary part of the Circuit Court's Final Summary Judgment and was merely a passing comment by the court, i.e., dicta. And since no economic or other evidence was ever presented to the state court to prove a taking, Monroe County never had *any* opportunity to litigate the issue of the supposed "taking" of NPL's property in the state court case.[6]

Because the state court's findings on the takings issue were mere surplusage, the district court did not err in making its own determination as to whether other economically viable uses for the property existed. The Eleventh Circuit noted that even if the state court were addressing the takings issue, the fact that the state court also found that Monroe County acted in good faith, thereby precluding any remedy for a temporary taking, mooted the question of whether there were other economically viable uses for the property. Thus, the Eleventh Circuit reasoned, the state court's statements regarding the lack of economically viable uses of the property were wholly unimportant.

Moreover, if there is *any* doubt as to the precise grounds upon which an earlier judgment was based, that circumstance is sufficient in itself to void the judgment of

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[6] Ironically, NPL would be happy to accept, as having preclusive effect, this passing comment of the trial judge that a taking occurred. That means NPL obviously would have no problem with *that judge* ruling on the issue *without* a jury having been empaneled because the comment is apparently in its favor, even though no takings issue was before the state court.

any preclusive effect. *See United States v. Irvin*, 787 F.2d 1506, 1515 (11th Cir. 1986) (emphasis in original; citations omitted) ("For estoppel to apply, the fact sought to be foreclosed by [a party] must necessarily have been determined in his favor in the prior trial; it is not enough that the fact *may* have been determined in the former trial"). Florida law is in accord. "[A] judgment entered on grounds not involving the merits is not a basis for barring later consideration of the merits." *Bashlor v. Wainwright*, 369 So. 2d 695, 697 (Fla. 1st DCA 1978).

This holding is especially apropos where one party – in this instance, NPL – affirmatively hid material facts from the court whose decision it sought to have applied preclusively; facts which, if they had been known, would or could have influenced the court's decision and resulted in a different outcome. The facts that NPL failed to disclose, of course, related to its prior sale of the property in question and its status before the state court as an improper party.

Similarly, the Florida state court that was handling the County's quiet title and constructive trust litigation at the time also was never advised that the defendant in that case (NPL) no longer owned the property in question. Final Judgment was entered in NPL's favor and the case was affirmed on appeal in the mistaken belief that NPL continued to be the appropriate defendant. *See Monroe County v. New Port Largo, Inc.*, 467 So. 2d 757 (Fla. 3d DCA 1985). Furthermore, at a time when it no longer had *any* interest in the airport breakwater property, NPL filed its Complaint in this case, in which it asserted that it was in fact *the current owner* of the airport breakwater property. R1-1.

The problem with NPL's entire argument is that it has misapprehended the law in takings cases; it has

always been NPL's position that the mere act of rezoning constituted a compensable taking. This analysis is wrong because a court must separately determine, as a matter of law, whether the rezoning rose to the level of a taking by evaluating whether the owner was deprived of all beneficial use of the property while the zoning was in effect. Thus, it is irrelevant to the takings question that the state court invalidated the zoning ordinance due to a procedural infirmity.

There is no reason to grant certiorari on the full-faith-and-credit issue as the facts demonstrate that estoppel was not warranted where the invalidation of the ordinance did not require the state court to address the beneficial-use question.

CONCLUSION

Respondent Monroe County, Florida, respectfully submits that a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX J

Monroe County, Fla., *Code* art. XIV,
§§ 19-295 to 19-302 (1987)
(Private Airport District)

ARTICLE XIV. PA – PRIVATE AIRPORT DISTRICT

Sec. 19-295. Intent.

(a) The PA district is intended to provide a classification of property where the private airport may be established. The provisions of this article shall apply to all presently existing private airports in Monroe County, as well as to all private airports which may be established in Monroe County hereafter. All requests for PA classifications hereunder shall be deemed major development projects and shall be processed accordingly.

(b) The zoning director shall not give zoning approval for any building permits for any structure to be located within or adjacent to any private airport area if, when built, said structure would constitute a violation of the protective provisions of this article. (Ord. No. 14-1979, § 1)

Sec. 19-296. Definitions.

(a) *Private airport* means an airport used primarily by the licensee but available for use by invitation of licensee. Limited service may be provided if authorized by the zoning department.

(b) *Runway* means the paved or unpaved surface of an airport landing strip.

(c) *Structure* means an object constructed or installed by man, including, but without being limited to, buildings, derricks, draglines, cranes and other boom-equipped machinery, towers, signs, smokestacks, utility poles or overhead transmission lines.

(d) *Helicopter* means a powered rotorhead vehicle that can hover. All other aircraft shall utilize airports. (Ord. No. 14-1979, § 1(1))

Sec. 19-297. Landing strip lengths and widths.

(a) Effective landing length shall be no less than eighteen hundred (1800) feet.

(b) Primary surface width shall be one hundred (100) feet.

(c) Usable width shall be no more than fifty (50) feet. (Ord. No. 14-1979, § 1(2))

Sec. 19-298. Landing approach zones.

(a) The landing approach zone for private airports is a trapezoidal area increasing gradually in width from fifty (50) feet either side of the runway center line, at the ends of each usable runway, to a width of three hundred and fifty (350) feet either side of the runway center line at a distance of three thousand (3,000) feet outward from the ends of each runway.

(b) Approach zones shall be clear of obstructions above a glide path of 20:1 from the ends of each usable runway. When the approach zone to any runway crosses a road, the glide path must pass at least fifteen (15) feet above the edge of the nearest traffic lane. (Ord. No. 14-1979, § 1(3))

Sec. 19-299. Prohibited uses.

Within or adjacent to the PA district, no establishments or uses that emit smoke, gas or dust in quantities or densities sufficient to jeopardize the safe use of private airports shall be allowed. (Ord. No. 14-1979, § 1(4))

Sec. 19-300. Nonconforming uses.

(a) The purpose of these regulations is to ensure the continued use of existing private airports. Under the provisions of this ordinance, should there be a conflict between the rights of the existing airports and surrounding properties, the rights of the existing airports shall take precedence. The zoning board and/or county commission may grant variances to any surrounding property owner so that reasonable use of the surrounding property may be had without interfering with the operation of the private airport.

(b) The provisions of this article shall not be construed to require the removal, lowering or other change or alteration of any structure or tree or use lawfully in existence not conforming to the regulations as of the effective date hereof. After the effective date hereof, property owners shall not be permitted to grow or maintain trees to heights in excess of those provided herein. Nothing herein contained shall require any change in the construction, alteration or intended use of any existing structure, the construction or alteration of which was lawfully begun prior to the effective date of this article.

(c) On any new proposed private airports, the rights of the surrounding property owners shall take precedence. All regulations involving private airports, such as runway lengths, etc., shall be predicated on the priority rights of surrounding properties. (Ord. No. 14-1979, § 1(5))

Sec. 19-301. Private helicopters.

(a) Private helicopters, after meeting all the following requirements, and after receiving zoning board approval, may receive a one-year permit to operate same from any zoning district, and said permit shall

be renewable by the zoning director if he deems appropriate; otherwise the same will require approval of the zoning board.

(1) A corridor of three hundred and sixty (360) degrees from the landing spot shall be established, with a radius of five hundred (500) feet, in which there shall be no residential use, except for the applicant.

(2) Any obstruction within the corridor shall be lower than an approach slope of a 5 horizontal to 1 vertical ratio.

(3) The center landing spot shall be marked as designated by FAA regulations. All landings shall be accomplished to the center landing spot.

(4) All distances and heights shall be based on ground level.

(5) All helicopters may land at any airport subject to FAA and local airport regulations.

(b) None of the above regulations shall apply to medical or emergency evacuation.

(c) Special medical evacuation locations may be granted by the zoning board without meeting the above requirements, as may be judged to be in the public interest. (Ord. No. 14-1979, § 1(6))

Sec. 19-302. Penalties and enforcement.

Each violation of this article or any regulation, order or ruling promulgated hereunder shall be punishable as provided by section 19-26. (Ord. No. 14-1979, § 1(7))

APPENDIX K

Ninth Circuit Order
Requiring Del Monte Dunes to
Respond to Petition for Rehearing

Del Monte Dunes at Monterey, Ltd. v. City of Monterey,
95 F.3d 1422 (9th Cir. 1996), *motion for reh'g pending*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL MONTE DUNES AT MONTEREY, LTD., et al., Plaintiff-Appellee, -vs- CITY OF MONTEREY, Defendant-Appellant.	No. 94-16248 D.C. No. CV-86-05042-CAL
DEL MONTE DUNES AT MONTEREY, LTD., and MONTEREY-DEL MONTE DUNES CORPORATION, Plaintiffs-Appellants, -vs- CITY OF MONTEREY, Defendant-Appellee.	No. 94-16313 ORDER (Filed Nov. 15, 1996)

Before: WALLACE, Circuit Judge.

Within twenty-one (21) days from the date of this order, plaintiffs-appellees/cross-appellants are requested to file a response to the petition for rehearing with suggestion for rehearing en banc filed by defendant-appellant/cross-appellee on October 4, 1996.

(3)

Supreme Court, U.S.
FILED
JUN 13 1997
OFFICE OF THE CLERK

No. 96-1752

In The

Supreme Court of the United States

October Term, 1996

NEW PORT LARGO, INC.,

Petitioner,

v.

MONROE COUNTY,

Respondent.

On A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Brief for Respondent, Monroe County, filed in opposition to New Port Largo's Petition for a Writ of Certiorari, underlines the appropriateness of this Court's exercise of its discretion to hear this case, *New Port Largo, Inc. v. Monroe County,* ("NPL II"), 95 F.3d 1084 (11th Cir. 1996) (App. A). Nowhere in Respondent's Brief does the County deny or minimize the importance of the issues raised by this case. Given the limited purpose of a reply brief under this Court's rules, Petitioner will only address the new issues raised by Respondent County in its Brief.

In its factual presentation, Respondent County once again presents a version of facts which a state court rejected in the County's lawsuit seeking to acquire title to the property in question. App. 1. The state court in this litigation found that the County zoned the property for residential use at the request of the owner (App. I-4 ¶ 17) because of the County's abandonment of the airport plan for lack of funding (App. I-3 ¶¶ 11-13), not because there was "no zoning classification applicable to airports." Respondent's Brief at 1. The owner did not construct a "runway" on the property, Respondent's Brief at 3, he constructed a "street" for future residents. App. I-3 ¶ 14. The original owner, contrary to Respondent's Brief at 1-2, denied that he ever requested a zoning change to allow for airport use (years before NPL's purchase of the property), but the relevance of this proposed change in zoning (filed by the airport lessee) is surely that the County *denied* the request, further documenting in the public records relied upon by Petitioner that the intended permanent use of the property was for residences and not for airport use.

Respondent County attempts to suggest that a paper transfer of title to the property in question from a corporation owned equally by its two principals to a corporation owned by one principal and a trust for the benefit of the other (essentially as part of a business divorce between the principals) (see App. D-6 to D-7)[1] could have had some effect on NPL's zoning challenge. Aside from the fact that the transfers were both legally and factually irrelevant to any issue in that case, and were disclosed of record to the County, Florida law expressly provided, Rule 1.260(c), Fla. R. Civ. P., that after a transfer of interest any action may nonetheless proceed in the name of the original party. Thus, there is no issue of misrepresentation or concealment presented by this record.

I. RIGHT TO JURY TRIAL

Regarding the jury trial issue, Respondent makes various arguments, which are mutually inconsistent. Respondent first attempts to argue that there is no conflict between the Ninth Circuit holding in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) and the Eleventh Circuit opinion for which review is sought in *NPL II*. In making this argument, the County ignores the Ninth Circuit's unambiguous ruling that the inverse condemnation plaintiff, "Del Monte was entitled to have a jury try its inverse condemnation

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[1] The Eleventh Circuit expressly declined to address this issue. App. A-13 at n.7.

claim." *Del Monte Dunes, supra,* 95 F.3d at 1427. In direct conflict, the Eleventh Circuit stated below:

> contrary to NPL's contention . . . no jury fact-finding is required in regulatory takings cases. [Citation to *Highland Beach* omitted] We agree with the district judge's determination that no jury had to be empaneled for the regulatory takings claim.

NPL II at 1092; App. A-16 to A-17.

A district judge under *Del Monte Dunes* might have discretion over whether to (1) decide as a legal matter if certain facts found by a jury (e.g., economically viable use, effect on investment backed expectation) amounted to a taking, or to (2) instead submit the ultimate "taking" issue itself to the jury. There is no "discretion", however, under *Del Monte Dunes,* to simply forego a jury which at least one party has demanded and try disputed factual issues to the court. It is only the Eleventh Circuit in the *New Port Largo* case which has rejected, in principle and absolutely, the right to jury trial itself on liability issues in inverse condemnation cases. This rejection is completely inconsistent with not only *Del Monte Dunes* but the many cases of this Court cited in Petitioner's Petition for Writ of Certiorari, the constitutional analysis of which is not addressed by Respondent.

Equally untenable is the County's attempt to sidestep the jury trial issue by claiming that what really happened below was a summary judgment, and not a trial at all. Effectively repudiating the Eleventh Circuit's stated basis for its holding, the Respondent County contends that the trial court only ruled on issues of law. Respondent's Brief

at 13-15. Thus the County makes the remarkable argument that the trial court's ruling on all issues in the case following an eight day trial with live witnesses was "little different than a judge holding a hearing on a motion to dismiss for failure to state a claim or ruling on a motion for summary judgment", Respondent's Brief at 15.[2] While some takings cases no doubt are determinable under Rule 56, *e.g., Suitum v. Tahoe Regional Planning Agency*, ___U.S.___, 1997 WL 273658, 8-9 & n.13 (takings case raises issues of fact which may or may not be resolvable on motion for summary judgment), the district court and the Eleventh Circuit did not address the issues in the instant case as a matter of law.

The district court ruled for Respondent County – after denying its motions for summary judgment because of disputed factual issues (App. D-12 to D-14) – based on its resolution of a number of *factual* issues, determined by judgments of witness credibility: for example, the value of the property under two different zoning scenarios, the profitability of a potential airport operation, and the supposed "profit" to NPL from a related party paper transaction (App. B-20 to B-25). The Eleventh Circuit followed along this same trail by explicitly reviewing the district court's decision under the "clearly erroneous" standard of review. App. A-9. Indeed, to eliminate any doubt on the point, the Eleventh Circuit characterized Petitioner's arguments on the merits as "essentially" quarrels with

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[2] In Respondent's Taking Clause argument, contrary to Respondent's position on the Jury Trial issue, Respondent once again relies on the factual findings and credibility determinations of the district court. Respondent's Brief at 17-18.

the district court's fact-finding i.e., his "decision to credit the testimony of Defendant's expert." (App. A-9) The plain holding of the Eleventh Circuit in *NPL II* was not that there were no factual issues, but that the district court, rather than the jury, was the appropriate party to resolve them.

Given Respondent County's attempt to erase the Ninth Circuit's opposing viewpoint in *Del Monte Dunes* and to transform the trial court's fact-finding in the present case into a summary judgment, it is perhaps not surprising that the County would distort the position of Petitioner on the jury trial issue at hearing where the County brought up (without benefit of briefing) its request to have the district court as finder of fact. The out of context sentence quoted by Respondent, Respondent's Brief at 8-9, was part of Petitioner's argument that in the circumstances of this case, Petitioner was entitled to a judgment of liability as a matter of law on the taking question, leaving only issues of damages for the jury. A party does not waive its demand for jury by claiming that it is entitled to prevail as a matter of law, contrary to the unique and unprecedented argument made by Respondent County, Brief at 15-16. In its selective account of that hearing, Respondent County fails to tell this Court that Petitioner's counsel noted that "the plaintiff would not waive any right to determination of factual issues by the jury that would then be provided to the Court for its legal analysis." R31-13. Indeed, NPL's attorneys strenuously argued that all fact issues, such as the value of the property under alternative zoning arrangements, should be submitted to a jury, notwithstanding that the ultimate decision as to liability, based upon the jury's factual

findings, might be a question of law for the court. Within days of the district court's oral ruling, contrary to NPL's argument, that all issues of liability would be resolved by the court, Petitioner filed an emergency Petition for Writ of Mandamus to the Eleventh Circuit, seeking to have a jury empaneled in the case to decide the factual issues relating to liability. Case No. 94-5031 (petition for writ of mandamus denied without opinion).

Given this procedural history, it is not surprising that nothing in the decisions of either the district court of the Eleventh Circuit remotely suggested a finding of waiver. Clearly, Respondent County's attempt to defeat review based on an argument of waiver is spurious. The erroneous holding of the Eleventh Circuit on the fundamental issue of the right to trial by jury remains a compelling reason for this Court to grant the Petition for Writ of Certiorari.

II. TAKINGS

Under the Eleventh Circuit decision in *NPL II*, a County may transform, without compensation, privately-owned residential property into an airport for satisfaction of an alleged need by the public for such an airport. (Respondent acknowledges, Brief at 3, that the airport it wanted to retain was a "public airport.") This is not an application of this Court's precedents but a fundamental rejection of their principles. That Respondent can defend this position highlights dramatically the apparent need for this Court to address the type of conduct that will be a taking under the Fifth Amendment.

III. FULL FAITH AND CREDIT

Rather than address the manifest importance of Full Faith and Credit principles in land use analysis, or the fundamentals of federalism upon which the full faith and credit statute is based, Respondent County takes the astonishing position that the issue of confiscation without compensation was not raised in state court, or was irrelevant to the invalidation of the zoning by the Florida courts. Respondent's Brief at 5, 22-25. These contentions are overwhelmed by the record.

The issue of takings (*not* as a claim for damages, as the Eleventh Circuit mistakenly assumed, but as a basis for invalidation of the airport zoning as confiscatory) was squarely raised in the pleadings in New Port Largo's state law zoning challenge. The governing Amended and Supplemental Complaint (PX-1-62) alleged:

> 15. Defendant, MONROE COUNTY, . . . has embarked upon a course of action to *deprive the Plaintiff of the subject property without offering compensation* therefor, all in violation of the Constitutions and laws of the United States and of the State of Florida.
>
> * * *
>
> 18. To allow the subject property to be zoned airport *would deprive Plaintiff of its property without compensation* for the purpose of providing Upper Monroe County with a public airport without compensation.

On December 12, 1985, the state court held a hearing on NPL's motion for summary judgment. PX-1-58. At the conclusion of the hearing, the Honorable Ignatius Lester decided to continue the hearing and he requested the

parties to submit briefs "to assist me in making the decision." PX-1-58-21. NPL submitted its brief on December 19, 1985. PX-1-62. The brief identified one of the "Questions Presented" as follows: *"Whether the rezoning is an unlawful course of action followed by the County which deprives the landowner of his property without just compensation . . . U.S. Const. Amend. V."* PX-1-62-i. Under Florida law, if a zoning ordinance denied an owner "any reasonable use" of his property, it amounted to a confiscatory taking and the zoning ordinance would be invalidated in a circuit court certiorari proceeding. *Kasser v. Dade County,* 344 So. 2d 928 (Fla. 3d DCA 1977); *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1517-19 (11th Cir. 1987); *Dade County v. National Bulk Carriers, Inc.,* 450 So. 2d 213, 216 (Fla. 1984). This was precisely what was argued by NPL in its brief:

> [T]he rezoning is *confiscatory* in a constitutional sense because it deprives the landowner of his property without just compensation therefor. . . . Clearly, this sort of confiscatory behavior will violate several statutes and constitutional provisions. . . .
>
> * * *
>
> . . . Additionally, *the rezoning violates both the Federal constitution and the Florida state constitution: " . . . nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V.* . . . The rezoning was tantamount to an acquisition of property without compensation, thereby violating the landowner's individual constitutional property rights. A zoning regulation will not be upheld where it constitutes an unconstitutional violation of property

> right. *Stokes v. Jacksonville*, 276 So. 2d 200 (Fla. 1st DCA 1973).

PX-1-62-14, 18.

After reviewing NPL's brief, Judge Lester conducted a *second* hearing, at which HPL's counsel "argued for invalidation . . . based on the arguments made in the NPL brief." R14-259. After reviewing the evidence, authorities, and arguments of counsel, Judge Lester entered a Final Summary Judgment on January 2, 1986, which was never appealed, ruling in favor of NPL and invalidating the zoning. Specifically, the state court held:

> The only permitted used in said zoning district is a private airport;
>
> * * *
>
> The subject property does not qualify by dimensions to meet the requirements as a public airport or a private airport; and
>
> * * *
>
> This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use.
>
> * * *
>
> Therefore, it is Ordered and Adjudged as follows: . . . The attempted rezoning of the subject property to Private Airport is invalid and Resolution No. 234-1980 is hereby quashed. . . .

PX-1-63-2 (App. H). These state court holdings were not dictum, or some irrelevant frolic the federal courts were

free to disregard.[3] Thus, contrary to Respondent's misstatements, this case does indeed present a sound record for the Court's review of questions critical to the application of cooperative federalism in land use jurisprudence.

CONCLUSION

WHEREFORE, Petitioner prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Miami, Florida

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[3] Respondent also acknowledges in its Takings argument what is obvious, that the district court and Eleventh Circuit analyses of the Taking issue were dependent on the district court's finding that "many profitable uses" other than airport were possible. Respondent's Brief at 20.